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HANDBOOK

ON THE

LAW OF DAMAGES

BY

WILLIAM B. HALE, LL. B.

Author of "Bailments and Carriers"

ST. PAUL, MINN.

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To

MY FATHER AND MOTHER

This book is affectionately dedicated.

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PREFACE.

The author's object in the present work, the preparation of which has occupied a large portion of his time and attention for a period of nearly two years, has been to state, explain, and illustrate with elementary clearness and accuracy all the rules and principles governing the award of damages in civil cases. In view of the limitations of space in a one-volume work, it has been thought best to give the greater prominence to the discussion of the general principles underlying the whole subject, letting the application of those principles to special classes of cases fall into a subsidiary place. Another reason for this arrangement is that the book is intended as much for the use of students as of practitioners, and for that purpose it is absolutely essential that the general and controlling principles of the subject should be fully and clearly explained. These are few, and are easily grasped when explained in logical and connected order; but when presented with a mass of details applicable only to the special case under discussion the difficulties of the subject are largely increased. Much confusion has also been caused by the loose and unscientific use of terms both by law writers and in judicial opinions. This is notably true with regard to nominal damages. That subject has been made almost unintelligible by the lack of consistency and precision in the use of the terms "wrong" and "damage." The notions embraced in these words have been very carefully analyzed in the first chapter. The fundamental nature of legal rights and wrongs has been looked at from a new point of view; and while no new theories are advanced, it is hoped that the subject has been made clearer. The question of damages in actions for injuries to land by the erection of permanent structures, upon which the courts are almost hopelessly confused, has also been looked at from the point of view established in the first chapter, and it is

hoped that the results there reached will be helpful. This systematic examination of the principles of damages with reference to fundamental notions has been followed throughout the work. In connection with each principle discussed, numerous illustrations have been given to show its various applications. By means of the index and the careful analysis of the subject in the table of contents reference to any desired point is made easy.

In conclusion, the author wishes to acknowledge his very substantial obligation to Mr. Tiffany's excellent treatises on "Sales" and "Death by Wrongful Act." Very free use has been made of these works in the chapters on those subjects. The writer also desires to express his thanks and appreciation of much kind assistance and valuable advice from Mr. E. A. Jaggard.

July 1st, 1896. W. B. H.

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HANDBOOK

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CHAPTER I.

DEFINITIONS AND GENERAL PRINCIPLES.

1. Definition and Nature.
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6–7. Forbidden Conduct.
8–11. Conduct neither Authorized nor Forbidden.
12. Analysis of Legal Wrongs.
13–14. Classification of Damages.

DEFINITION AND NATURE.

1. Damages are the pecuniary reparation which the law compels a wrongdoer to make to the person injured by his wrong.

Wherever the common law recognizes a right, it also gives a remedy for its violation.[1] "Ubi jus, ibi remedium." "Right" and "remedy" are correlative terms. Remedies are either preventive of threatened wrongs, or redressive of wrongs committed. Redressive remedies may afford specific relief, as where one is compelled to do the very thing he agreed to do; or they may afford merely a pecun-

[1] 3 Bl. Comm. p. 123, c. 8; Ashby v. White, 1 Salk. 19, 21; Yates v. Joyce, 11 Johns. 136, 140.

iary reparation, as where a money award is given in lieu of the thing agreed to be done. Common-law remedies, with few exceptions,[2] are of the latter kind. For most wrongs, an award of a pecuniary recompense is the sole remedy afforded. Equity may prevent threatened wrongs by injunction, or afford specific relief; but at common law almost the sole power of the court is to make and enforce a money judgment.[3] The rules by which the amount of money or damages to be awarded in particular cases is determined constitute the law of damages, and form the subject of the present volume. These rules form a branch of the remedial law, and in the following pages their application always presupposes a violation of a right given or recognized by the law substantive.

Damages a Species of Property.

The right to recover damages for an injury is a species of property, and vests in the injured party immediately on the commission of the wrong.[4] It is not the subsequent verdict and judgment, but the commission of the wrong, that gives the right. The verdict and judgment simply define its extent. Being property, it is protected by the ordinary constitutional guaranties.[5] Except when the wrong is a personal tort, or the breach of a marriage promise,

[2] Replevin, detinue, ejectment, proceedings to recover dower, abatement of nuisance, quo warranto, mandamus, prohibition, habeas corpus, estrepement, and the obsolete brevia anticipantia. See 1 Co. Litt. 100a; Story, Eq. Jur. §§ 730, 825.

[3] In Robinson v. Bland, 2 Burrows, 1077–1086, an action for nonpayment of money, Lord Mansfield said: "Although this be nominally an action for damage, yet it is really and effectually brought for a specific performance of the contract; for pecuniary damages upon a contract for the payment of money are, from the nature of the thing, a specific performance."

[4] 2 Bl. Comm. 438; 1 Suth. Dam. § 7; 1 Sedg. Dam. § 5.

[5] Cooley, Const. Lim. (5th Ed.) 445; Streubel v. Railroad Co., 12 Wis. 74; Westervelt v. Gregg, 12 N. Y. 202, 211; Dash v. Van Kleeck, 7 Johns. 477; Thornton v. Turner, 11 Minn. 336 (Gil. 237); Williar v. Association, 45 Md. 546; Griffin v. Wilcox, 21 Ind. 370; Chicago, St. L. & N. O. R. Co. v. Pounds, 11 Lea, 127; Thirteenth & F. St. P. Ry. v. Boudrou, 92 Pa. St. 475, 482. It cannot be extinguished except by act of the parties, or by operation of statutes of limitation. Bowman v. Teall, 23 Wend. 306; Allaire v. Whitney, 1 Hill, 484; Whitney v. Allaire, 1 N. Y. 305; Christianson v. Linford, 3 Rob. (N. Y.) 215; Bayliss v. Fisher, 7 Bing. 153; Willoughby v. Backhouse, 4 Dowl. & R. 539, 2 Barn. & C. 821; Clarke v. Meigs, 10 Bosw. 337.

it passes to the injured party's personal representative, and is assignable.[6]

THE THEORY OF DAMAGES.

2. The theory upon which damages are awarded in civil actions is that they are an indemnity to the person injured, not a punishment to the wrongdoer.

EXCEPTION—Where a tort is accompanied by circumstances of fraud, gross negligence, malice, or oppression, exemplary damages are sometimes awarded as a punishment to the offender.

Compensation the Rule.

Compensation is the fundamental and all pervasive principle governing the award of damages.[7] Compensation, not restitution, value,

[6] Final v. Backus, 18 Mich. 218; Sears v. Conover, *42 N. Y. 113; North v. Turner, 9 Serg. & R. (Pa.) 244; Johnston v. Bennett, 5 Abb. Prac. (N. S.) 331; Butler v. New York & E. R. Co., 22 Barb. 110; Zabriskie v. Smith, 13 N. Y. 322; Haight v. Hayt, 19 N. Y. 464; Richtmeyer v. Remsen, 38 N. Y. 206; Purple v. Hudson R. R. Co., 4 Duer, 74; Zogbaum v. Parker, 66 Barb. 341; Waldron v. Willard, 17 N. Y. 466; Grocers' Nat. Bank v. Clark, 48 Barb. 26; McKee v. Judd, 12 N. Y. 622; McDougall v. Walling, 48 Barb. 364; Fried v. New York Cent. R. Co., 25 How. Prac. 285; Rice v. Stone, 1 Allen, 566; Munsell v. Lewis, 4 Hill, 635; Robinson v. Weeks, 6 How. Prac. 161; Jordan v. Gillen, 44 N. H. 424; Grant v. Ludlow's Adm'r, 8 Ohio St. 1; Foy v. Troy & B. R. Co., 24 Barb. 382; Smith v. New York & N. H. R. Co., 28 Barb. 605; Blakeney v. Blakeney, 6 Port. (Ala.) 109; Nettles v. Barnett, 8 Port. (Ala.) 181; Hoyt v. Thompson, 5 N. Y. 320, 347; Nash v. Hamilton, 3 Abb. Prac. 35; The Sarah Ann, 2 Sumn. 206, Fed. Cas. No. 12,312; Meech v. Stoner, 19 N. Y. 26; Linton v. Hurley, 101 Mass. 353. See Barnard v. Harrington, 3 Mass. 228.

[7] Filliter v. Phippard, 12 Jur. 202, 204, 11 Adol. & E. (N. S.) 347, 356. "The declared object of awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if the contract had been performed or the tort not committed." Sedg. Dam. § 30; Smith v. Sherwood, 2 Tex. 460; Grillin v. Colver, 16 N. Y. 489, Mechem, Cas. Dam. 74; Robinson v. Harman, 1 Exch. 850. "In general, the rule for the measure of damages in cases of tort may be said to be that which aims at actual compensation for the injury. * * * There are qualifications, however; as that inadvertent or unintentional injuries or acts, unaccompanied with malice, draw after them only their direct and immediate consequences, and not those remote and speculative; while grossly

not cost, is the measure of relief.[8] Whether the action be ex contractu or ex delicto, the end in view is the same,—that plaintiff be made whole. "In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort. Except in those special cases where punitory damages are allowed, the inquiry must always be, what is an adequate indemnity to the party injured? And the answer to that question cannot be affected by the form of action in which he seeks his remedy."[9] Indemnity is achieved, in the eyes of the law, by awarding plaintiff a money judgment. Practically, an injured party seldom receives complete indemnity. All injuries are not pecuniary, and many are difficult to estimate in money. No amount of money is adequate to compensate one for the loss of a limb or an eye. Their value cannot be estimated in money. But, in the nature of things, a money award is the only redress the law can offer.

Proximate and Remote Consequences.

Though compensation is the theory and aim of the law in awarding damages, every consequence of a wrong is not an element in the calculation of what is legal compensation. A person wronged can recover compensation only for the direct or proximate consequences of the wrong. To hold one liable for all the consequences of a

negligent or malicious acts may be the subject of large damages." Agnew J., in Seely v. Alden, 61 Pa. St. 302, 304. See, also, Forsyth v. Wells, 41 Pa. St. 291; Woodman v. Nottingham, 49 N. H. 387. "The injured party must be indemnified. He must be placed in the same situation in which he would have been had the wrong not been committed." Duer, J., in Suydam v. Jenkins, 3 Sandf. 614, 620.

[8] Pol. Torts, c. 5, citing Whitham v. Kershaw, 16 Q. B. Div. 613. See, also, Snell v. Delaware Ins. Co., 4 Dall. 430; Quinn v. Van Pelt, 56 N. Y. 417. Cf. Waters v. Greenleaf-Johnson Lumber Co., 115 N. C. 648, 20 S. E. 718.

[9] Baker v. Drake, 53 N. Y. 211, 220. In an action for breach of contract of carriage, "what the passenger is entitled to recover is the difference between what he ought to have had and what he did have." Hobbs v. Railroad Co., L. R. 10 Q. B. 111, 120. See, also, Wall v. City of London Real Property Co., L. R. 9 Q. B. 249. Damages for breach of contract is not limited by the consideration paid. Quinn v. Van Pelt, 56 N. Y. 417; Bennett v. Buchan, 61 N. Y. 222.

wrongful act "would set society on edge, and fill the courts with useless and injurious litigation." [10]

A rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service would be a serious hindrance to the operations of commerce, and to the transaction of the common business of life. The effect would often be to impose a liability wholly disproportionate to the nature of the act or service which a party had bound himself to perform, and to the compensation received.[11] For example, consider the consequences of a failure to pay money when due. "It may bring pecuniary embarrassment to the payee, and subject him to extortion from usurers: loss of valuable and profitable contracts and undertakings,—prospective gains and profits; to the importunity of creditors; suits at law and in equity; and consequent costs and expenses; and, finally, bankruptcy and pecuniary ruin. It may cause not only loss of business, but of reputation, of comfort, peace of mind, and happiness. And, moreover, it may cause suffering, sickness, insanity, and destroy the social standing and relations, not only of himself, but of his family. But these possible, nay, perhaps, common, results, are too remote and intangible to be considered as legal losses resulting from the nonpayment of money when due. The task of investigating such results, and fixing a pecuniary value on them, would be hopeless. And, if it were possible, the liability for such remote consequential losses would appall the most heroic and paralyze the energies of the most enterprising business man." [12] The law therefore limits liability for consequences to the direct or proximate results of the act complained of.[13] "Causa proxima et non remota spectatur." Any other rule would result in wrong and injustice. There is a point beyond which the chain of causation cannot be traced with any degree of certainty. "To the proximate cause we may usually trace consequences with some degree of as-

[10] Fleming v. Beck, 48 Pa. St. 309, 313.

[11] Squire v. Western Union Tel. Co., 98 Mass. 232; Cutting v. Grand Trunk Ry. Co., 13 Allen, 381; Fox v. Harding, 7 Cush. 516; Le Peintur v. Southeastern Ry. Co., 2 Law T. (N. S.) 170.

[12] Field, Dam. § 211.

[13] Add. Torts, 6. See, also, post, 34.

surance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile." [14]

Exemplary Damages.

The allowance of anything more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil actions are awarded: [15] but the case of aggravated torts constitutes a well-recognized exception to the rule. In such cases it is thought that the damages are not limited to an amount sufficient to compensate plaintiff for the wrong suffered, but that a further sum, called "exemplary," "vindictive," or "punitive" damages, may be awarded as a punishment to the offender.[16] Exemplary damages cannot be recovered for breach of contract,[17] with perhaps the single exception of a breach of promise of marriage.[18] In many jurisdictions the soundness of the doctrine of exemplary damages is stoutly denied, but the weight of authority is the other way. The doctrine is to be supported, if at all, mainly on the grounds of

[14] Cooley, Torts, p. 73.

[15] Field, Dam. § 32, note; Milwaukee & St. P. Ry. Co. v. Arms, 91 U. S. 489.

[16] Thus, in Emblen v. Myers, 6 Hurl. & N. 54, it was held that the jury might take into consideration the motives of the defendant; and, if negligence was accompanied with a contempt of the plaintiff's rights and convenience, they might give exemplary damages. See, also, Day v. Woodworth, 13 How. 363; Winter v. Peterson, 24 N. J. Law, 524; Hagan v. Providence & W. R. Co., 3 R. I. 88; Dean v. Blackwell, 18 Ill. 336; Schindel v. Schindel, 12 Md. 108; Goddard v. Grand Trunk Ry., 57 Me. 202, Mechem, Cas. Dam. 26; Lucas v. Michigan Cent. R. Co., 98 Mich. 1, 56 N. W. 1039, Mechem, Cas. Dam. 12.

[17] In Singleton's Adm'r v. Kennedy, 9 B. Mon. (Ky.) 222, it was expressly held that vindictive damages could not be given for a fraudulent breach of contract.

[18] Southard v. Rexford, 6 Cow. 254; Coryell v. Colbaugh, 1 N. J. Law, 90; Stout v. Prall, Id. 93; Denslow v. Van Horn, 16 Iowa, 476; Berry v. Da Costa, L. R. 1 C. P. 331; Green v. Spencer, 3 Mo. 318; Hill v. Maupin, Id. 323; Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308. See, also, Baldy v. Stratton, 11 Pa. St. 316, 322, in which it was held by Rogers, J., that "it would be a mere mockery of justice to confine the jury to give compensation merely for the value of a worthless husband." In Thorn v. Knapp, 42 N. Y. 474, it was held that, as to the measure of damages, an action for breach of promise of marriage has always been classed with actions of torts, and that the defendant's motives might be inquired into as furnishing grounds for punitive damages.

authority and convenience. The subject will be fully considered in a subsequent chapter.[19]

Damages a Mixed Question of Law and Fact.

The extent of the loss caused by a wrong, and therefore the quantum of damages necessary to indemnify the party injured, is a question of fact, but it is not left to the arbitrary discretion of a jury. The rule by which the amount or extent of redress should be ascertained in any given case is a question of law,[20] and the jury are bound by the rule laid down by the court.[21] In cases where exemplary damages are considered proper, and those cases of personal torts where the damages cannot be measured by any definite pecuniary standard, because not made up of pecuniary elements, the sound discretion of the jury is the only standard possible;[22] and even in this class of cases, though the jury have a large discretion, it is not wholly arbitrary, for the court may set aside a verdict which is so unreasonable as to clearly show that it was the result of passion or prejudice.*

WRONG AND DAMAGE.

3. Whenever a legal right is violated, and only then, damages may be recovered.

Damnum absque Injuria—Injuria sine Damno.

The law does not undertake vain or impossible things. It has always recognized that in actual life many losses must go without compensation, and much harm be suffered without redress. Not every damage in fact is damage in law. "There is merely an imperfect coincidence between the spheres of things hurtful in fact and things hurtful in law; the sphere of the latter being smaller than, and included in, that of the former. This distinction is expressed in the technical language of English lawyers by the pair of contrasted terms 'damnum' and 'injuria,'—the former comprising that which is hurtful in fact; the latter, that which is wrongful in law.

19 See post, 200. 20 See post, 227. 21 See post, 227.
22 See post, 229. * See post, 230.

The space throughout which the sphere of the former fails to coincide with that of the latter is the domain of what is technically known as 'damnum absque injuria'" [23]

To sustain an action for damages, the violation of a legal right must be shown.[24] For every violation of a legal right damages may be recovered.[25] This is necessarily so, for, as has been seen, an award of damages is substantially the only remedy of the common law; and, if damages could not be recovered for the violation of every legal right, there would be rights without remedies, and "it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." [26] "Rights and duties, so called, existing beyond the limits of legal remedy, may be matter of enlightened curiosity, and moral and metaphysical speculation, but

[23] Salmond, Jur. 160.

[24] Webb v. Portland Manuf'g Co., 3 Sumn. 189, Fed. Cas. No. 17,322, and Mechem, Cas. Dam. 3. "A legal right must be invaded in order that an action of tort may be maintained. The mere fact that a complainant may have suffered a damage of the kind which the law recognized is not enough. There must also be a violation of a duty recognized by law. In the language of the civil law, mere damnum is not enough; there must also be injuria." Jag. Torts, 87. "You must have, in our law, injury as well as damage." Jessell, M. R., in Day v. Brownrigg, 10 Ch. Div. 294 (304). See, also, Backhouse v. Bonomi, 9 H. L. Cas. 503; Salvin v. Coal Co., 9 Ch. App. 705. It is an essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right. Merely that it will, however, do a man harm in his interest, is not enough. Rogers v. Rajendro, 13 Moore, P. C. 209. "At the foundation of every tort, there must be some violation of a legal duty, and therefore some unlawful act or omission." Rich v. New York Cent. & H. R. R. Co., 87 N. Y. 382. "The violation of a moral right or duty, unless it also amounts to a legal right or duty, does not constitute a tort." Chase, Lead. Cas. 8; 1 Aust. Jur. lect. 5, "Conflict of Law and Morality"; Rex v. Smith, 2 Car. & P. 449. "It is not every moral and social duty the neglect of which is the ground of an action; for there are what are called, in the civil law, 'duties of imperfect obligation,' for the enforcing of which no action lies." Lord Kenyon, C. J., in Pasley v. Freeman, 3 Term R. 51, 63.

[25] Webb v. Portland Manuf'g Co., 3 Sumn. 189, Fed. Cas. No. 17,322, and Mechem, Cas. Dam. 3.

[26] Lord Hold in Ashby v. White, 2 Ld. Raym. 955.

they are not violations of common law." [27] It is necessary, therefore, to determine the exact nature of legal rights.

Same—Legal Rights and Wrongs.

Governments exist for the benefit of the governed, and this benefit is afforded in the establishment and protection of rights.[28] Every law exists for the purpose of establishing and protecting legal rights.[29] A legal right is a right with which the law invests one person, and in respect to which, for his benefit, a duty is imposed on another or others to do or refrain from doing certain acts.[30] Rights and duties are correlative and coexistent terms. Sometimes the right is given, and sometimes the duty is created. Whenever a right is given, the corresponding duty at once arises; whenever a duty is created, a corresponding right springs into existence. "Violation of right" and "breach of duty" are equivalent terms.[31]

The one fundamental right of which all men are desirous, and for the enforcement of which governments are established, is the right not to be harmed in any respect which affects their being and well-being, their happiness, and immunity from pains. In our system of law, speaking broadly, this right not to be harmed takes the form of the common-law command not to injure another in respect to his person, his property, or his reputation.[32] This is the duty imposed on all members of the community, and the correlative rights arise in each member not to be injured in respect to his security of person, his security of reputation, and his security in the acquisition and enjoyment of property. Rights which cannot be referred to one of these three classes have no legal existence. For example, the law has not created a right to privacy; and therefore an action for damages for the invasion of privacy by opening windows was dismissed. Defendant, by overlooking plaintiff's property, violated no legal right of the plaintiff, because a right to privacy is unknown[33] So, also, the law has not created a right to

[27] American note to Coggs v. Bernard, 1 Smith, Lead. Cas. Eq. 411.

[28] Cooley, Torts, 23.

[29] Holl. Jur. c. 8; Wise, Jur. 20.

[30] Aust. Jur. lect. 16. See, also, lect. 6.

[31] Pig. Torts, 10.

[32] Pig. Torts, 10; Cooley, Torts, 23.

[33] Tapling v. Jones, 11 H. L. Cas. 290.

mental tranquillity, and therefore no action lies for causing fright or nervous terror, unaccompanied by physical harm.[34] A mere insult, however gross, is not actionable.*

It is obvious that, even with respect to person, property, and reputation, the right not to be harmed cannot exist to the full extent of the above broad statement of the right; for, as every member of the community has the same right not to be harmed, the rights of different individuals would clash. Thus, the right of one to do what he likes on his own property, which is a part of his right not to be harmed in respect to his property, may conflict with the right of another not to be harmed in respect to his property. Each one's right not to be harmed, therefore, must be limited so as to allow of the equal exercise by others of their rights. It follows that harm may sometimes be inflicted without violating a legal right, for all harm is not prohibited. In other words, while damage or harm is an essential element, mere damage alone does not constitute a legal wrong.[35]

While the primary object of law is to prevent harm, and all legal rights may be resolved into the right not to be harmed, the fact that conduct results in damage or harm is not conclusive that such conduct is wrongful in law; for, as has been seen, the law does not forbid all damage. There has been much confusion of thought in regard to the terms "damnum" and "injuria," which may be avoided by careful definition and consistent use of the terms. Thus, it is said that no action lies for damnum absque injuria; and this, as has been seen, is true, the phrase being translated "actual damage without legal wrong."[36] But the converse of this proposition is also stated,—that no action lies for injuria sine damno. Translating, as before, we have the proposition that "for a legal wrong without actual damage no action lies," which is untrue. As has been seen,

[34] Atchison, T. & S. F. R. Co. v. McGinnis, 46 Kan. 109, 26 Pac. 453; Terre Haute & I. R. Co. v. Brunker, 128 Ind. 542, 26 N. E. 178; Canning v. Inhabitants of Williamstown, 1 Cush. 451; Ft. Worth & D. C. Ry. Co. v. Burton (Tex. App.) 15 S. W. 197; Gulf, C. & S. F. Ry. Co. v. Trott, 86 Tex. 412, 25 S. W. 419; Ewing v. Railway Co., 147 Pa. St. 40, 23 Atl. 340. Cf. Yoakum v. Kroeger (Tex. Civ. App.) 27 S. W. 953.

* By Code, Va. § 2897, insulting words are made actionable.

[35] See ante, note 24.

[36] Ante, p. 7.

to deny the remedy is to deny the right which has been violated.[37] Again, substituting for "legal wrong" its equivalent, we have the proposition that "for the violation of a right not to be harmed, without actual damage, no action lies," which is sheer nonsense.

It is objected that damage is not always an essential element of a legal wrong, because many wrongs are admitted to exist for which an action may be maintained, though no damage has resulted. Thus, one is liable for trespass if he merely walks across another's field, though he does absolutely no damage;[38] and one who breaks a contract is liable in damages, though the breach actually results in a benefit to the other party.[39] It is equally clear that in many cases conduct is not actionable, i. e. wrongful in law, unless followed by damage. Thus, negligence is not actionable, unless it results in damage.[40] It is therefore sometimes said that there are two kinds of wrongs, according as damage is or is not an essential element, and two kinds of rights corresponding,—absolute rights and the right not to be harmed.[41] It has been well said that no more unsatisfac-

[37] Ante, p. 8.

[38] "So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there." Holt, C. J., in Ashby v. White, Ld. Raym. 938, 955. "There is no doubt that a right of action accrues whenever a person interferes with his neighbor's rights, as, for example, by stepping on his land; * * * and this though no actual damage may result." Erle, C. J., in Smith v. Thackerah, L. R. 1 C. P. 564, 566. See, also, Dixon v. Clow, 24 Wend. 188; McAneany v. Jewett, 10 Allen, 151; Carter v. Wallace, 2 Tex. 206.

[39] Hibbard v. W. U. Tel. Co., 33 Wis. 558. For the technical breach of a bond, though without damage, nominal damages may be recovered. State v. Reinhardt, 31 Mo. 95. Though a trespass result in benefit, instead of damage, plaintiff is entitled to recover. Jewett v. Whitney, 43 Me. 242; Jones v. Hannovan, 55 Mo. 462; Murphy v. Fond du Lac, 23 Wis. 365.

[40] "Mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused." Brunsden v. Humphrey, 14 Q. B. Div. 141, 150.

[41] Mr. Jaggard says in his work on Torts, at page 80: "The simple truth is that sometimes plaintiff can recover when he has not shown damage, and sometimes he cannot. On the one hand, mere damage may not constitute a cause of action, in the absence of violation of duty. On the other hand, mere violation of duty may not constitute a cause of action, in the absence of damage. There may be no such thing as a legal wrong without damage, but

tory distinction could be devised.[42] The true solution of the difficulty is to be found in the principle of presumption of damage. "In some cases, from the very nature of the case, the law conclusively presumes damage; that is, the plaintiff is not put to the trouble of proving it. In other cases the law does not presume damage; that is, the plaintiff is required to prove its existence. This being so, the right, as we have already pointed out, is, in all cases, not to be injured; in my person, my reputation, or my property, as the case may be." [43] Accurately speaking, there is no such thing as injuria sine damno,[44] because injuria imports damnum.[45] Whenever a legal right is violated, damage is necessarily done.

LAWFUL AND UNLAWFUL CONDUCT.

4. For the purpose of determining what conduct is actionable,—i. e. wrongful in law,—conduct may be divided into three classes:

(a) Authorized conduct (p. 12).

(b) Forbidden conduct (p. 15).

(c) Conduct neither authorized nor forbidden (p. 19).

SAME—AUTHORIZED CONDUCT.

5. Damage necessarily incident to authorized conduct does not constitute a cause of action. It is damnum absque injuria.

For the benefit of society at large, and to prevent a clash between rights of individuals, certain conduct is expressly authorized by law.

sometimes there cannot be a legal wrong unless there has been damage. In some cases the law presumes damage, and in some cases damages must be proved. In other words, there are two kinds of rights,—one, a simple right, the infringement of which is, in the absence of exceptional circumstances, necessarily actionable; the other is a right not to be harmed, the violation of which is actionable only when harm is suffered."

[42] Pig. Torts, 126.

[43] Id.

[44] Salmond, Jur. 169; Innes, Torts.

[45] Webb v. Portland Manuf'g Co., 3 Sumn. 189, Fed. Cas. No. 17,322.

Damage necessarily caused by such authorized conduct will not support an action. It is damnum absque injuria. Its infliction is not a legal wrong.[46] Conduct may be authorized either by statute or by common law. For damage resulting from the proper exercise of statutory authority no action lies.[47] Thus, annoyance from noise, smoke, and disturbances necessarily attending the operation of a railroad under its franchise, and its interference with property, is damnum absque injuria;[48] but, if the road be operated without authority, liability attaches.[49] So, also, where a local nuisance is authorized by statute, its maintenance is not actionable.[50] The common law authorizes many acts which harm another. Harm necessarily caused by the exercise of one's ordinary rights will not support an action. For example, damage consequent upon competition in trade is not actionable, for every one is authorized to engage in

[46] Jagg. Torts, p. 139 et seq., exhaustively collecting and discussing cases.

[47] Managers v. Hill, L. R. 6 App. Cas. 193; Gaslight & Coke Co. v. Vestry of St. Mary Abbott's, 15 Q. B. Div. 1, 5; J. S. Keator Lumber Co. v. St. Croix Boom Corp., 72 Wis. 62, 38 N. W. 529; Hamilton v. Railroad Co., 119 U. S. 280, 7 Sup. Ct. 206; Sedalia Gaslight Co. v. Mercer, 48 Mo. App. 644; Beseman v. Pennsylvania R. Co., 50 N. J. Law, 235, 20 Atl. 169; Durand v. Borough of Ansonia, 57 Conn. 70, 17 Atl. 283; Iron Mountain R. Co. v. Bingham, 87 Tenn. 522, 11 S. W. 705; Bell v. Norfolk S. R. Co., 101 N. C. 21, 7 S. E. 467; Jones v. St. Louis R. Co., 84 Mo. 151; Slatten v. Des Moines Valley R. Co., 29 Iowa, 148, 154; Richardson v. Vermont Cent. R. Co., 25 Vt. 465; Ellis v. Iowa City, 29 Iowa, 229; Hatch v. Vermont Cent. R. Co., 25 Vt. 49; Dodge v. Essex Co., 3 Metc. (Mass.) 380. Perhaps the best illustration of the absence of liability for damages incident to authorized act is to be found in the contrast of Rylands v. Fletcher, L. R. 3 H. L. 330, with the Zemindar Case, L. R. 1 Indian App. 364.

[48] Atchison & N. R. Co. v. Garside, 10 Kan. 552; Carroll v. Wisconsin Cent. R. Co., 40 Minn. 168, 41 N. W. 661; Beideman v. Atlantic City R. Co. (N. J. Ch.) 19 Atl. 731.

[49] Jones v. Railway Co., L. R. 3 Q. B. 733.

[50] Fertilizing Co. v. Hyde Park, 97 U. S. 659; Hinchman v. Patterson Horse R. Co., 86 Am. Dec. 252; Managers of the Metropolitan Asylum Dist. v. Hill, 6 App. Cas. 193; Truman v. Railway Co., 29 Ch. Div. 89-108, 11 App. Cas. 45; Biscoe v. Railway, L. R. 16 Eq. 636; Cogswell v. Railroad Co., 103 N. Y. 10, 8 N. E. 537; Edmondson v. City of Moberly, 98 Mo. 523, 11 S. W. 990; Eastman v. Amoskeag Manuf'g Co., 82 Am. Dec. 201; Bancroft v. City of Cambridge, 126 Mass. 438. Where a bridge constructed in accordance with legislative authority interferes with navigation, the injury to private persons is dam-

business;[51] nor does liability attach to the ordinary use of one's property.[52] Private persons are sometimes authorized to exercise disciplinary powers. Thus, the master of a ship is not liable for force used in maintaining order and discipline,[53] and parents or persons in loco parentis may enforce discipline by moderate chastisement or detention.[54] "The rights of necessity are a part of the law."[55] There is no liability for acts or omissions as to which a person has no option.[56] Thus, when a highway becomes obstructed

num absque injuria. Hamilton v. Railroad Co., 119 U. S. 280, 7 Sup. Ct. 206; Rhea v. Railroad Co., 50 Fed. 20; U. S. v. North Bloomfield Gravel Min. Co., 53 Fed. 627.

[51] Gloucester Grammar School Case (1410–11), Y. B. 11 Hen. IV. p. 47, pl. 21; Mogul S. S. Co. v. McGregor, 23 Q. B. Div. 598. See, also, Chasemore v. Richards, 7 H. L. Cas. 349.

[52] A blacksmith may operate his forge, and a merchant his store, without liability, although neighbors thereby suffer annoyance. Doellner v. Tynan, 38 How. Prac. (N. S.) 182; Smith v. Ingersoll Drill Co., 7 Misc. Rep. 374, 27 N. Y. Supp. 907, collecting cases; McGuire v. Bloomingdale, 8 Misc. Rep. 478, 29 N. Y. Supp. 580.

[53] The Agincourt, 1 Hagg. Adm. 271–274; Bangs v. Little, 1 Ware, 506, Fed. Cas. No. 839; U. S. v. Alden, 1 Spr. 95, Fed. Cas. No. 14,427; Cushman v. Ryan, 1 Story, 91, Fed. Cas. No. 3,515; Turner's Case, 1 Ware, 83, Fed. Cas. No. 14,248; Wilson v. The Mary, Gilp. 31, Fed. Cas. No. 17,823; Michaelson v. Denison, 3 Day (Conn.) 294; Brown v. Howard, 14 Johns. (N. Y.) 119; Sampson v. Smith, 15 Mass. 365; Flemming v. Ball, 1 Bay (S. C.) 3; Mathews v. Terry, 10 Conn. 455; State v. Board of Education, 63 Wis. 234, 23 N. W. 102; Allen v. Hallet, 1 Abb. Adm. 573; Payne v. Allen, 1 Spr. 304, Fed. Cas. No. 10,855; Schelter v. York, Crabbe, 449, Fed. Cas. No. 12,446; Jay v. Almy, 1 Woodb. & M. 262, Fed. Cas. No. 7,236; Butler v. McLellan, 1 Ware, 219. Fed. Cas. No. 2,242; Buddington v. Smith, 13 Conn. 334.

[54] Cooley, Torts, 197; Johnson v. State, 2 Humph. 283; Winterburn v. Brooks, 2 Car. & K. 16.

[55] Respublica v. Sparhawk, 1 Dall. 357–362; Mouse's Case, 12 Coke, 63; Burton v. McClellan, 3 Ill. 434; American Print Works v. Lawrence, 23 N. J. Law, 604.

[56] The destruction of property for the public good is authorized by necessity. Case of Prerogative, 12 Coke, 13; Maleverer v. Spinke, Dyer, 36b; McDonald v. City of Red Wing, 13 Minn. 38 (Gil. 25); Bowditch v. Boston, 101 U. S. 16; Metallic Compression Casting Co. v. Fitchburg R. Co., 109 Mass. 277; Hyde Park v. Gay, 120 Mass. 590; Surocco v. Geary, 3 Cal. 70; American Print Works v. Lawrence, 23 N. J. Law, 590; Beach v. Trudgain, 2 Grat. (Va) 219; Hale v. Lawrence, 23 N. J. Law, 590. And see Arundel v. McCulloch, 10 Mass. 70; Campbell v. Race, 7 Cush. (Mass.) 408; Mouse's Case.

and impassable, a traveler is authorized to go on adjoining lands to avoid the obstruction, and hence he is not liable for trespass.[57] The law also authorizes one to repel unlawful or dangerous force by force, in the defense of person, property, or possession, whenever there is a real or an apparent necessity, honestly believed to be real, for the defense. For example, where one acting in self-defense accidentally shoots an innocent bystander, he is not liable if guilty of no negligence.[58] In all these cases, the act being expressly declared to be lawful, the harm necessarily resulting is damnum absque injuria, or "damage without legal wrong." It is the price men pay for the benefits of society.

SAME—FORBIDDEN CONDUCT.

6. An action lies to recover damages for forbidden conduct by the person for whose benefit the conduct was forbidden, without proof that actual damage resulted. The law conclusively presumes damage.

12 Coke, 63; Respublica v. Sparhawk, 1 Dall. 357; Taylor v. Plymouth, 8 Metc. (Mass.) 462. As to statutory changes, see Fisher v. Boston, 104 Mass. 87. "There are many cases in which individuals sustain an injury for which the law gives no action; for instance, pulling down houses, or raising bulwarks for the preservation of the kingdom against the king's enemies. * * * This is a case to which the maxim applies, 'Salus populi suprema lex est.'" Butler, J., in Governor, etc., British Cast Plate Manufacturers v. Meredith, 4 Term R. 794, 797. See, also, 12 Coke, 12, 13; Dyer, 60b; Russell v. Mayor, etc., of City of New York, 2 Denio, 461. And see the opinion of Butler, J., in Taylor v. Whitehead, 2 Doug. 745, 749. Peril to human life may constitute such necessity as will excuse what would otherwise be wrongdoing. Metropolitan Asylum Dist. v. Hill, L. R. 6 App. Cas. 193–205; Eckert v. Long Island R. Co., 43 N. Y. 502; Pennsylvania Co. v. Roney, 89 Ind. 453; Clark v. Famous Shoe & Clothing Co., 16 Mo. App. 463.

[57] Donahoe v. Wabash, St. L. & P. Ry. Co., 83 Mo. 560; Bullard v. Harrison, 4 Maule & S. 387–393; Campbell v. Race, 7 Cush. (Mass.) 408; Burd. Lead. Cas. 136. As to ways of necessity, see Bish. Noncont. Law, 872; Vossen v. Dautel, 116 Mo. 379, 22 S. W. 734; Camp v. Whitman (N. J. Ch.) 26 Atl. 917; Lankins v. Terwilliger, 22 Or. 97, 29 Pac. 268.

[58] Morris v. Platt, 32 Conn. 75; Paxton v. Boyer, 67 Ill. 132; Scott v. Shepherd, 2 W. Bl. 892. As to damage caused in trying to avoid missile, see Valle v. United States Exp. Co., 147 Pa. St. 401, 23 Atl. 591.

7. Where conduct is forbidden for the benefit of the public,—that is, where a public duty is created,—an individual cannot maintain an action for its breach, unless he sustains special damage thereby.

For reasons essentially of public policy, to prevent breaches of the peace, and because its necessary or probable effect is damage to some one, the law absolutely forbids certain conduct. A duty is imposed on all members of the community to refrain from such conduct, and the correlative right to have them refrain arises on the part of those for whose benefit the duty is created. These rights correspond to "absolute rights" in the classification of those writers who divide rights into absolute rights and rights not to be harmed.[59] From their violation, the law conclusively presumes that some damage has resulted.[60] In this class of cases therefore, it is sufficient

[59] It will be convenient to sometimes use the term "absolute rights" to designate the rights corresponding to forbidden conduct. There is no objection to the term if it is understood that it merely stands for specialized instances of the right to immunity from harm.

[60] "Every injury imports a damage, though it does not cost the party one farthing." Lord Holt, in Ashby v. White, 2 Ld. Raym. 955. "I can very well understand that no action lies in case where there is damnum absque injuria; that is, where there is damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand how it can correctly be said (in a legal sense) that an action will not lie even in a case of a wrong or violation of a right, unless it is followed by some perceptible damage which can be established as a matter of fact; in other words, that injuria sine damno is not actionable. On the contrary, from my earliest reading I have considered it laid up among the very elements of the common law that wherever there is a wrong there is a remedy to redress it, and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages." Justice Story, in Webb v. Portland Manuf'g Co., 3 Sumn. 189, Fed. Cas. No. 17,322, and Mechem, Cas. Dam. 3. When it is understood that the right violated is in all cases a right to immunity from harm, it will readily be conceded that "every injury imports damage in the nature of it"; but the phrase does not tell us a great deal, for the fact remains that in many cases damage must be proved to show an injury (wrong). The learned judge evidently referred to those absolute or specialized rights which are correlative to a prohibition. "Actual, perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage; injuria sine damno is actionable." Per Park, B.,

to simply prove the conduct, proof of damage being relevant with respect to the amount of compensation recoverable, but not with respect to the existence of the cause of action. In all other cases the law indulges in no presumption, but leaves the party complaining of a wrong to prove it by showing the presence of both its essential elements,—the conduct itself and the resulting damage. Cases of defamation afford a good illustration of the principle under discussion. Damage is such a probable consequence of certain slanderous and libelous statements that the law absolutely forbids them. These statements are said to be actionable per se. Proof of their utterance, without more, is sufficient to sustain an action, for the law presumes the damage.[63] Other false and defamatory statements may cause harm, but the harm is not such a probable or necessary consequence. The law therefore does not specifically forbid such statements, and, to maintain an action therefor, both the words and the resulting damage must be proved.[64] Assaults,

in Embrey v. Owen, 6 Exch. 353; McLeod v. Boulton, 3 U. C. Q. B. 84; Whipple v. Cumberland Manuf'g Co., 2 Story, 661, Fed. Cas. No. 17,516; Bagby v. Harris, 9 Ala. 173; Paul v. Slason, 22 Vt. 231; Cory v. Silcox, 6 Ind. 39; Little v. Stanback, 63 N. C. 285.

[63] Henkle v. Schaub, 94 Mich. 542, 54 N. W. 293; Smith v. Sun Printing & Pub. Ass'n, 5 C. C. A. 91, 55 Fed. 240; Wynne v. Parsons, 57 Conn. 73, 17 Atl. 362; Newell, Defam. 181. To accuse one in print of lying is actionable per se. Riley v. Lee, 88 Ky. 603, 11 S. W. 713; Prosser v. Callis, 117 Ind. 105, 19 N. E. 735. So to call a man a "skunk," Massuere v. Dickens, 70 Wis. 83, 35 N. W. 349; or a "swindler," Janson v. Stuart, 1 Term. R. 748; Smith v. Stewart, 41 Minn. 7, 42 N. W. 595.

[64] Ratcliffe v. Evans [1892] 2 Q. B. 524; Daniel v. New York News Pub. Co., 67 Hun, 649, 21 N. Y. Supp. 862; Bradstreet Co. v. Gill, 72 Tex. 119, 9 S. W. 753; Brown v. Durham, 3 Tex. Civ. App. 244, 22 S. W. 868; Haney Manuf'g Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073. Defamatory words that harm no one, even if false, are not actionable; as where they were uttered in the presence of the slandered person only, Sheffill v. Van Deusen, 13 Gray, 304; or in a foreign language, which was not understood. Kiene v. Ruff, 1 Iowa, 482, Burdick, Lead. Cas. Torts, 215; Warmouth v. Cramer, 3 Wend. 395; Townsh. Sland. & L. (4th Ed.) 94; 1 Starkie, Sland. & L. 361. Defamatory words spoken by a lunatic, whose insanity was obvious, or known to all the hearers, are not actionable. Dickinson v. Barber, 9 Mass. 224-227; Bryant v. Jackson, 6 Humph. 199; Yeates v. Reed, 4 Blackf. 463. So, also, of words spoken or understood as a jest. Donoghue v. Hayes, 265. See, also, Broderick v. James, 3 Daly, 481; Myers v. Dresden, 10 Iowa, 560; Van Rensselaer v. Dole,

trespasses, and the like are illustrations of forbidden conduct. To enumerate every case in which damages will be presumed "would be to recapitulate the whole corpus juris."[65]

Public Wrongs.

Where a public duty is created,—that is, where conduct is prohibited for the benefit of the community at large,—an individual cannot maintain an action for its breach. The remedy is by indictment on behalf of the public. The law gives no private remedy for anything but a private wrong.[66] The reason is one of public policy, and is well stated by Lord Coke in regard to public nuisances.[67] "A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance, and then it is not reasonable that a particular person should have the action, for, by the same reason that one person might have an action for it, by the same reason every one might have an action, and then he would be punished a hundred times for one and the same cause." Where, however, the breach of a public duty results in special and peculiar damage to an individual, he may maintain an action, for all the elements of an actionable wrong are present, and no principle of public policy prevents.[68] It devolves upon plaintiff to bring himself within the exception. He must allege and prove that he has suffered special and peculiar damage. The law will not presume it.[69] The right to maintain the action does not depend on the number injured, but upon the personal character of the injury.[70]

1 Johns. Cas. 279; Chase v. Whitlock, 3 Hill, 139; Sheffill v. Van Deusen, 13 Gray, 304.

[65] Sedg. Dam. § 98.

[66] 3 Bl. Comm. 219; 4 Bl. Comm. 167; Broom, Leg. Max. 206.

[67] Williams' Case, 5 Coke, 72. See, also, Iveson v. Moore, 1 Salk. 15.

[68] "Where one suffers in common with all the public, although from his proximity to the obstructed way, or otherwise, from his more frequent occasion to use it, he may suffer in a greater degree than others, still he cannot have an action because it would cause such a multiplicity of suits as to be itself an intolerable evil. But when he sustains a special damage differing in kind from that which is common to others, as where he falls into a ditch unlawfully made in the highway, and hurts his horse, or sustains a personal injury, then he may bring his action." Proprietors of Quincy Canal v. Newcomb, 7 Metc. (Mass.) 276.

[69] Winterbottom v. Derby, L. R. 2 Exch. 316.

[70] Cooley, Torts, 102; Henly v. Mayor, etc., of Lyme, 5 Bing. 91, 3 Barn. &

"If many persons receive a private injury by a public nuisance, everyone shall have his action." [71] The nature of the special damage pertains rather to the right of action than the measure of damages, and with it we are not specially concerned.

SAME—CONDUCT NEITHER AUTHORIZED NOR FORBIDDEN.

8. An action may be maintained for damage caused by conduct which is neither authorized nor forbidden, provided it was

(a) Malicious (p. 20),

(b) Negligent (p. 21), **or**

(c) Done at peril (p. 21).

Between the two classes of conduct expressly authorized by law and conduct expressly forbidden, there is a third class, comprising the great mass of human actions, in which the conduct is neither expressly authorized nor forbidden, and in which liability for consequences must be referred directly to the great fundamental right of immunity from harm. This class corresponds to the second division in the classification of rights into absolute rights and rights not to be harmed. In it, damage is never presumed, but must be proved, or the violation of a right is not shown. The law, however, has not undertaken the impossible task of insuring against all harm. It recognizes the fact that unfortunate accidents will occur, for which no one is to blame, and wisely and justly, in most cases, leaves him to bear the loss upon whom it has fallen. The law, however, has pursued no consistent theory of liability.[72] Liability is recognized in three classes of cases: (1) Where the conduct was malicious; (2) where the conduct was negligent; and (3) where it was done at peril. In the first two classes, liability attaches on

Adol. 77; Nicholl v. Allen, 1 Best & S. 936; McKinnon v. Penson, 8 Exch. 319; King v. Richards, 8 Term R. 634.

[71] Per Holt, C. J., in Ashby v. White, Ld. Raym. 938, 955. See, also, Williams' Case, 5 Coke, 73; Co. Litt. 56a; Corley v. Lancaster, 81 Ky. 171.

[72] Jagg. Torts, 48. O. W. Holmes, Jr., in 7 Am. Law Rev. 652; Holmes, Com. Law, 79; Wabash, St. L. & P. Ry. Co. v. Locke, 112 Ind. 404, 14 N. E. 391.

the theory of culpability. In the third class, it attaches on the theory that there is a duty to insure safety. Each class will be considered briefly.

9. MALICIOUS CONDUCT—An action may be maintained for damages caused by an act done intentionally without just cause or excuse.

It is a legal wrong to do willful harm to another without just cause or excuse.[73] If there exists a right of immunity from harm, it is clear that the negative duty of not doing willful harm must also exist, subject to necessary exceptions. Thus, the prosecution in good faith of a groundless action is not a legal wrong to defendant, though he is put to large expense;[74] but, if the action is prosecuted maliciously and without probable cause, it is a legal wrong.[75] Fraud, deceit, conspiracy, strikes, boycotts, malicious interference with contract, and the like, are examples of conduct wrongful in

[73] Bowen, L. J., in Mogul Steamship Co. v. McGregor, L. R. 23 Q. B. 598, [1892] App. Cas. 25, citing Bromage v. Prosser, 4 Barn. & C. 247; Capital, etc., Bank v. Henty, L. R. 7 App. Cas. 74. This statement avoids the common principles, for example, as in 1 Add. c. 1, § 9, p. 36 (40). "But every malicious act wrongful in itself in the eyes of the law, if it causes hurt or damage to another, is a tort, and may be the foundation of an action." An act wrongful in itself producing damage is naturally actionable. Generally, Jagg. Torts, 555; Clerk & L. Torts, 16; Green v. Button, 2 Cromp., M. & R. 707; Cattle v. Stockton Waterworks Co., L. R. 10 Q. B. 43. An interesting article on the right to so maliciously exercise one's legal rights as to cause damage to others, and the remedy therefor, 58 J. P. 814.

[74] Woodmansie v. Logan, 2 N. J. Law, 86; Muldoon v. Rickey, 103 Pa. St. 110; Eberly v. Rupp, 90 Pa. St. 259.

[75] In an action for malicious prosecution, malice must be alleged and proved. Saxon v. Castle, 6 Adol. & El. 652; Page v. Wiple, 3 East, 314; Vanduzor v. Linderman, 10 Johns. 106. Emerson v. Cochran, 111 Pa. St. 619, 4 Atl. 498. Malice is a distinct issue. Smith v. Maben, 42 Minn. 516, 44 N. W. 792; Cooper v. Hart, 147 Pa. St. 594, 23 Atl. 833. The burden of proving malice is on the plaintiff. 2 Greenl. Ev. § 449; Barton v. Kavanaugh, 12 La. Ann. 332; Mitchell v. Jenkins, 5 Barn. & Adol. 588; Whalley v. Pepper, 7 Car. & P. 506; Walker v. Cruikshank, 2 Hill, 297; Melvin v. Chancy (Tex. Civ. App.) 28 S. W. 241; Barber v. Scott (Iowa) 60 N. W. 497; Welsh v. Cheek (N. C.) 20 S. E. 460; Womack v. Fudikar, 47 La. Ann. 33, 16 South. 615.

law, because of malice and resulting damage. If either is absent, the wrong is not complete.[76]

10. NEGLIGENT CONDUCT — An action may be maintained for damage caused by negligent conduct.

The law imposes the general duty of exercising due care to avoid harm. Whenever damage results from a failure to exercise such care, a legal wrong is committed. Negligence which does not result in damage is not wrongful in law. "Mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused."[77] The principles involved in this class of cases are too familiar to require discussion here.[78]

11. CONDUCT AT PERIL—An action may sometimes be maintained for damage caused by conduct which is neither malicious nor negligent. The duty to avoid harm is regarded as absolute.

"Perhaps the commonest conception of liability in tort is expressed by the classical phrase that a man acts at his peril. He insures the world against wrong on his part. The duty to avoid harm to others is regarded as absolute. Breach of that duty, and consequent damage, are sufficient to create responsibility without reference to his mental attitude; that is, his consciousness or intention. This view of the law had its origin in the early Germanic conceptions of liability. These conceptions inclined to the position that, whenever harm was done, some one must be held responsible. There was no definite logic in the selection of the victim. The primitive notion instinctively visited liability on the visible offending cause, whatever it might be, of a visible evil result."[79]

[76] Jagg. Torts, c. 9, "Malicious Wrongs."

[77] Brunsden v. Humphrey, 14 Q. B. Div. 141, 150.

[78] For an exceptionally clear and concise discussion of the principles of liability for negligence, see Jagg. Torts, c. 12.

[79] Jagg. Torts, p. 49.

Acts complained of as nuisances are perhaps the best illustration of acts done at peril. Liability is not at all dependent upon either care or motive.[80] Absolute liability is also recognized in a class of cases of which Fletcher v. Rylands [81] is a type. In these cases liability for damage is dependent neither upon malice nor negligence, but upon the ownership, use, custody, or control of some dangerous instrumentality.[82] Critical modern investigation is questioning and denying the doctrine of absolute liability, and many exceptions are recognized by the courts.[83]

SUMMARY.

The substance of much of the foregoing discussion may be summarized in the following analysis of a legal wrong.

[80] Upjohn v. Board, 46 Mich. 542, 9 N. W. 845; Cairncross v. Village of Pewaukee, 86 Wis. 181, 56 N. W. 648; Lamming v. Galusha, 135 N. Y. 239, 31 N. E. 1024. The use of ordinary skill and caution in the construction of work (as draining surface water) will not protect from liability, if there has been a failure to provide against any damage which might have been foreseen. Staton v. Norfolk & C. R. Co., 111 N. C. 278, 16 S. E. 181. Cf. Gulf, C. & S. F. Ry. Co. v. Steele (Tex. Civ. App.) 26 S. W. 926. Contributory negligence is ordinarily no defense to a nuisance. Philadelphia & R. R. Co. v. Smith, 12 C. C. A. 384, 64 Fed. 679. Cf. Willis v. City of Perry (Iowa) 60 N. W. 727.

[81] L. R. 1 Exch. 265. Cf. Losee v. Buchanan, 51 N. Y. 476.

[82] Things dangerous in themselves may be regarded from the point of view of nuisance, negligence, or breach of duty to insure safety. Cumberland Telephone & Telegraph Co. v. United Electric Ry. Co., 42 Fed. 273–281. The opinion of Brown, J., in this case is eminently clear and able. Van Norden v. Robinson, 45 Hun, 567. For an able discussion of liability in this class of cases, see Jagg. Torts, p. 832 et seq.

[83] Jagg. Torts, 53; Pig. Torts, c. 7; Brown v. Kendall, 6 Cush. 292; Harvey v. Dunlop, Hill & D. 193; Nitro-Glycerine Case, 15 Wall. 524; Lansing v. Stone, 37 Barb. 15; Center v. Finney, 17 Barb. 94; Morris v. Platt, 32 Conn. 75; Paxton v. Boyer, 67 Ill. 132; Dygert v. Bradley, 8 Wend. 470; 1 Hill, Torts, c. 5, § 9; 2 Greenl. Ev. 85. See, also, Holmes v. Mather, L. R. 10 Exch. 261; Stanley v. Powell [1891] Q. B. Div. 86.

ANALYSIS OF LEGAL WRONGS.

12. A legal wrong is committed whenever
   (a) Conduct which is either
      (1) Forbidden,
      (2) Malicious,
      (3) Negligent, or
      (4) Done at peril
   (b) Results in damage, which may be either
      (1) Actual or
      (2) Presumed.

CLASSIFICATION OF DAMAGES.

13. With respect to their object, damages may be divided into
   (a) Compensatory damages and
   (b) Exemplary damages.

14. With respect to amount, compensatory damages may be divided into
   (a) Nominal damages and
   (b) Substantial damages.

CHAPTER II.

NOMINAL DAMAGES.

15–17. Definition and General Nature.

DEFINITION AND GENERAL NATURE.

15. Nominal damages are damages insignificant in amount; a sum of money that can be spoken of, but has no existence in point of quantity.

16. Nominal damages are awarded only in cases where the law presumes damage. Whenever the law presumes damage, it presumes the lowest possible amount; that is, nominal damages.

17. Whenever damages must be proved to show the violation of a legal right, proof of nominal damage will not support an action. The law applies the maxim, "De minimis non curat lex."

It is a fundamental principle of the law of damages that, whenever one's rights have been invaded, he is entitled to compensation proportional to the amount of the injury.[1] The extent of actual injury is usually a question of fact.[2] In the absence of proof, the law can seldom say that a given wrong has resulted in damage of a definite amount. But, as has been seen, in many, and perhaps most, cases, proof of damage is essential to the proof of a legal wrong.[3] In current phraseology, damages are the gist of the action. In this class of cases, the law awards the amount of damages that have been proved. But there is another class of cases,

[1] Sedg. Dam. 28; Suth. Dam. 18. "It is a rational and legal principle that the compensation should be equivalent to the injury." Bussy v. Donaldson, 4 Dall. 206. "It is a general and very sound rule of law that, where an injury has been sustained for which the law gives a remedy, that remedy shall be commensurate to the injury sustained." Rockwood v. Allen, 7 Mass. 254.

[2] Ante, 7.

[3] Ante, 7.

in which damages are not the gist, and need not be proved, because they are presumed by law. This occurs, as has been seen, wherever the conduct complained of is absolutely forbidden.[4] In this class of cases a wrong can be shown without proof of damage. If no damages in fact are or can be proved, the legal presumption nevertheless remains.[5] But the presumption is only that some damage has resulted; the law cannot presume a definite amount. "This requires some practical expression as the compensation for a technical injury. Therefore, nominal damages are given, as six cents, a penny, or a farthing,—a sum of money that can be spoken of, but has no existence in point of quantity. Verdicts and judgments for nominal damages generally specify a small sum which may be paid." [6] It is only in cases where damages are not of the gist—that is, in cases of forbidden conduct—that nominal damages

[4] Ante, 15.

[5] Webb v. Portland Manuf'g Co., 3 Sumn. 189, Fed. Cas. No. 17,322; Laflin v. Willard, 16 Pick. 64; Goodnow v. Willard, 5 Metc. (Mass.) 517; Lawrence v. Rice, 12 Metc. (Mass.) 535. See, also, Whittemore v. Cutter, 1 Gall. 429, 433, Fed. Cas. No. 17,600; Marsh v. Billings, 7 Cush. 322; Davis v. Kendall, 2 R. I. 566. Cf. Paul v. Slason, 22 Vt. 231, Mechem, Cas. Dam. 8. Where an absolute right created by the prohibition of certain conduct is violated, damage is necessarily done, for the possessor of the right is deprived of something secured to him by law. Damage is presumed because it is inevitable that damage has resulted, though it cost the party nothing; "no, not so much as a litttle diachylon." All damage is not pecuniary. In Ashby v. White, Ld. Raym. 938, 958, where plaintiff had been deprived of a right to vote, Lord Holt, answering the objection that plaintiff had suffered no damage, said: "This action is brought by the plaintiff for the infringement of his franchise. You would have nothing to be a damage but what is pecuniary, and a damage to property;" but "a damage is not merely pecuniary, but an injury imports a damage where a man is thereby hindered of his right." Piggott defined "damnum" as the violation of these absolute or specialized rights. Pig. Torts, 10. See, also, Id., "Nominal Damages," 135.

[6] Suth. Dam. 18. "Where the law implies the injury, it also implies the lowest damage." Pastorius v. Fisher, 1 Rawle, 27. And see Repka v. Sergeant, 7 Watts & S. 9. Where a party fails to furnish ore to a smelting company for a reduction at a fixed price, the company cannot recover more than nominal damages, where the quality of the ore was not fixed, unless they prove the profits of the smelting of whatever grade might be furnished. Patrick v. Colorado Smelting Co. (Colo. Sup.) 38 Pac. 236. See, also, Fraser v Echo Mining & Smelting Co. (Tex. Civ. App.) 28 S. W. 711.

can be recovered;[7] for it is only in this class of cases that a legal wrong can be shown without proof of actual damage. If substantial damage is shown, an equivalent amount is awarded, and the principle of nominal damages is not involved. The actual damage shown, however small, may be recovered.[8] If there is in fact no damage,[9] but rather a benefit,[10] nominal damages are, nevertheless, allowed.

[7] In Brown v. Watson, 47 Me. 161, it was held that for an injury to a private person, however inconsiderable, he may maintain an action. The plaintiff in that case had been compelled to take a circuitous route, because of obstructions placed in the road. He was allowed to recover.

[8] Defendant may attempt "not to defeat the action altogether, but to restrict the amount of damages recovered to a nominal sum, by proving that the injury itself has not been substantial. The question involved in such cases is really one of compensation purely. If no substantial loss can be proved, the plaintiff must be restricted to nominal damages." Sedg. Dam. 149; Freese v. Crary, 29 Ind. 524; Carl v. Granger Coal Co., 69 Iowa, 519, 29 N. W. 437; Thorp v. Bradley, 75 Iowa, 50, 39 N. W. 177; Bruce v. Pettengill, 12 N. H. 341; Hunt v. D'Orval, Dud. (S. C.) 180; Tully v. Fitchburg R. Co., 134 Mass. 500.

[9] Mellor v. Spateman, 1 Saund. 346b; Brant v. Gallup, 111 Ill. 487; Cook v. Hull, 3 Pick. 269; Bolivar Manuf'g Co. v. Neponset Manuf'g Co., 16 Pick. 241; Stowell v. Lincoln, 11 Gray, 434; Pollard v. Porter, 3 Gray, 312; Pond v. Merrifield, 12 Cush. 181; Shattuck v. Adams, 136 Mass. 34; Newcomb v. Wallace, 112 Mass. 25; Marzetti v. Williams, 1 Barn. & Adol. 412; Warre v. Calvert, 7 Adol. & E. 143; Embrey v. Owen, 6 Exch. 352; Northam v. Hurley, 1 El. & Bl. 663; McConnel v. Kibbe, 33 Ill. 175; Burnap v. Wight, 14 Ill. 301; Dent v. Davison, 52 Ill. 109; Graver v. Sholl, 42 Pa. St. 58; Delaware & H. Canal Co. v. Torrey, 33 Pa. St. 143; Chamberlain v. Parker, 45 N. Y. 569; Dixon v. Clow, 24 Wend. 188; Quin v. Moore, 15 N. Y. 432; McIntyre v. New York Cent. R. Co., 43 Barb. 532; Ihl v. Forty-Second St. & G. St. F. R. Co., 47 N. Y. 317; Chapman v. Thames Manuf'g Co., 13 Conn. 268; Eaton v. Lyman, 30 Wis. 41; Adams v. Robinson, 65 Ala. 586; Empire Gold Min. Co. v. Bonanza Gold Min. Co., 67 Cal. 406, 7 Pac. 810; Hancock v. Hubbell, 71 Cal. 537, 12 Pac. 618; Kenny v. Collier, 79 Ga. 743, 8 S. E. 58; Mize v. Glenn, 38 Mo. App. 98; Jones v. Hannovan, 55 Mo. 462. "The action may be maintained to vindicate the rights." Per Justice Story, in Webb v. Portland Manuf'g Co., 3 Sumn. 189, Fed. Cas. No. 17,322. It is sometimes said that

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[10] Hibbard v. W. U. Tel. Co., 33 Wis. 558; Jewett v. Whitney, 43 Me. 242; Jones v. Hannovan, 55 Mo. 462; Murphy v. City of Fond du Lac, 23 Wis. 365; Stowell v. Lincoln, 11 Gray, 434; Gile v. Stevens, 13 Gray, 146; Francis v. Schoellkopf, 53 N. Y. 152.

De Minimis non Curat Lex.

The oft-quoted, but little-understood, maxim, "De minimis non curat lex," does not prohibit the allowance of nominal damages.[11]

the violation of a right with a possibility of damage is sufficient to maintain an action. Ross v. Thompson, 78 Ind. 90; Allaire v. Whitney, 1 Hill, 484. See Whitney v. Allaire, 4 Denio, 554. But this is meaningless. If the right violated is an absolute one, damage need not be proved. If it is the fundamental right not to be harmed, damage must be proved in order to show a violation of the right. In Allaire v. Whitney, 1 Hill, 484, it was held to be actionable per se to draw one into a contract by fraud. The court said: "Indeed, in all such cases it would not be difficult to show the degree of actual damage. The time of the injured party has been consumed in doing a vain thing, or one comparatively vain; and time is money. Fraud is odious to the law; and fraud in a contract can hardly be conceived of without being attended with damage in fact." Refusal by banker to pay check. Marzetti v. Williams, 1 Barn. & Adol. 415; Winterbottom v. Wright, 10 Mees. & W. 107. See, also, Rolin v. Steward, 14 C. B. 595, where actual damages were given. The omission of an administrator to settle his accounts with the probate court renders him liable for nominal damages at all events. Webb v. Gross, 79 Me. 224, 9 Atl. 612; Fay v. Haven, 3 Metc. (Mass.) 109; McKim v. Bartlett, 129 Mass. 226; Probate Court v. Slason, 23 Vt. 306. Contra, Olmstead v. Brush, 27 Conn. 530. A riparian owner may recover nominal damages for a bare infringement of his rights. New York Rubber Co. v. Rothery, 132 N. Y. 293, 30 N. E. 841; Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 South. 78; Lund v. City of New Bedford, 121 Mass. 286; Tillotson v. Smith, 32 N. H. 90; Shannon v. Burr, 1 Hilt. 39; Champion v. Vincent, 20 Tex. 811. But see Cory v. Silcox, 6 Ind. 39; McElroy v. Goble, 6 Ohio St. 187; Wood v. Waud, 3 Exch. 748. Nominal damages may be recovered for the unlawful flowage of lands, Chapman v. Copeland, 55 Miss. 476; Gerrish v. New Market Manuf'g Co., 30 N. H. 478; Amoskeag Manuf'g Co. v. Goodale, 46 N. H. 53; or for false imprisonment, Deyo v. Van Valkenburgh, 5 Hill, 242. In England it is held that, in an action against a public officer for neglect of duty, the

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11 Fullam v. Stearns, 30 Vt. 443. "This maxim is never applied to the positive and wrongful (i. e. forbidden) invasion of another's property. To warrant an action in such a case, says a learned writer, 'some temporal damage, be it more or less, must actually have resulted, or must be likely to ensue. The degree is wholly immaterial; nor does the law upon every occasion require distinct proof that an inconvenience has been sustained. For example, if the hand of A. touch the person of B., who shall declare that pain has not ensued? The only mode to render B. secure is to infer that an inconvenience has actually resulted.'" Seneca Road Co. v. Auburn & R. R. Co., 5 Hill, 170, 175.

Keeping clearly in mind the fundamental idea that all legal rights are rights to immunity from harm, the proper application of the maxim is easily understood. The law is a practical science, adapted to the needs and conditions of every-day life. It does not attempt to insure men against all harm. Trifling vexations and losses incident to existence in a social state must be borne. The law will not countenance litigation over what is insignificant, for mere purposes of vexation. But nominal damages are given only in cases where the defendant has been guilty of forbidden conduct, or, in other words, when an absolute right has been violated. What the law has considered important enough to forbid cannot be regarded as a trifle. To require proof of substantial damages would in many cases nullify the prohibition, and destroy the right, by taking away the remedy for its violation. The maxim has no application to this class of cases, and it is only in this class of cases that nominal damages are ever awarded. Where, however, damages are not presumed, but must be proved,—that is, where the right directly involved is the fundamental right of immunity from harm, and not a specialized or absolute right correlative to a prohibition,—proof of merely nominal damages will not support an action. Here alone is the maxim, "De minimis non curat lex" properly applied to take away a right of action. The law no longer distinguishes between no appreciable damage and no damage at all.[12]

plaintiff must show damage. The right which every man has to the services of such officer is relative to the benefit to be derived therefrom. The right and benefit are co-extensive; and, if the benefit is negatived, the right ceases. Wood, Mayne, Dam. 11; Pig. Torts, p. 129; Wylie v. Birch, 4 Q. B. 566; Williams v. Mostyn, 4 Mees. & W. 145; Stimson v. Farnham, L. R. 7 Q. B. 175; Hobson v. Thellusson, L. R. 2 Q. B. 642. In America it is generally held that the officer is liable without proof of damage. "The plaintiff is entitled to nominal damages for the officer's neglect. * * * No actual damages are proved, but, where there is neglect of duty, the law presumes damage." Laflin v. Willard, 16 Pick. 64. See, also, Goodnow v. Willard, 5 Metc. (Mass.) 517; Lawrence v. Rice, 12 Metc. (Mass.) 535; Mickles v. Hart, 1 Denio, 548; Patterson v. Westervelt, 17 Wend. 543; Palmer v. Gallup, 16 Conn. 555; Crawford v. Andrews, 6 Ga. 244.

12 St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642; Smith v. Thackerah, L. R. 1 C. P. 564.

Nominal Damages Establish Rights.

The principal purpose of allowing nominal damages is the establishment of rights. As has been seen, a denial of nominal damages in all cases when no actual damages can be proved would often be a denial of those specialized or absolute rights which grow out of forbidden conduct. A fortiori, an action must lie "whenever the act done is of such a nature as that, by its repetition or continuance, it may become the foundation or evidence of an adverse right." [13] A judgment for the smallest conceivable sum is as effective for declaring the existence or nonexistence of a right as any sum, however large.[14] Illustrations of actions brought to establish rights in which nominal damages were awarded might be multiplied indefinitely.[15] A few will suffice. In the Tunbridge Wells Dipper's Case [16] the defendant had dipped bathers without having been chosen for the post by the homage according to statute. It was not proved that she had received any gratuity, but the plaintiffs were held entitled to nominal damages, in order to prevent the possibility of damage. In Patrick v. Greenway [17] the defendant fished in the plaintiff's several fisheries, but caught nothing. Plaintiff was nevertheless held entitled to a verdict because of the infringement of the right, which could thereafter be used as evidence of

[13] Webb v. Portland Manuf'g Co., 3 Sumn. 189, Fed. Cas. No. 17,322. "Generally, when one encroaches upon the inheritance of another, the law gives a right of action; and, even if no actual damages are found, the action will be sustained, and nominal damages recovered, because, unless that could be done, the encroachments acquiesced in might ripen into legal right, and the trespasser, by a continuance of his encroachments, acquire a perfect title." Hathorne v. Stinson, 12 Me. 183. See, also, Seidensparger v. Spear, 17 Me. 123; Chapman v. Thames Manuf'g Co., 13 Conn. 269.

[14] Patrick v. Greenaway, 1 Saund. 346b, note; Devendorf v. Wert, 42 Barb. 227; Bassett v. Salisbury Manuf'g Co., 8 Fost. (N. H.) 438; Thomas v. Brackney, 17 Barb. 654; Carhart v. Auburn Gas Light Co., 22 Barb. 297; Honsee v. Hammond, 39 Barb. 89; O'Riley v. McChesney, 3 Lans. 278; Delaware & H. Canal Co. v. Torrey, 33 Pa. St. 143.

[15] "To state when rights are infringed, and consequently when nominal damages are recoverable, would be to recapitulate the whole corpus juris." Sedg. Dam. 137.

[16] 2 Wils. 414.

[17] Cited in note to Mellor v. Spateman, 1 Saund. 346b.

the exercise of the right by defendant. In Bower v. Hill [18] the plaintiff's right of way on a stream was obstructed, but the damage was problematical on account of the state of the stream. Plaintiff was held entitled to nominal damages, because acquiescence in the obstruction would be evidence of a renunciation of the right of way. In Blofeld v. Payne [19] the defendant imitated the plaintiff's hones, and the envelopes in which they were sold, thereby infringing his right. Plaintiff was allowed to recover, although no loss of custom was shown. In all these cases the conduct of defendant was expressly forbidden. A denial of nominal damages would have been a denial of the right for the purpose of creating which the conduct was forbidden.

New Trials and Costs.

The importance of the right to recover nominal damages often consists in its effect on costs.[20] Where plaintiff is entitled to nominal damages, but judgment is given for defendant, it will be reversed, if nominal damages will entitle plaintiff to costs;[21] otherwise not,[22] for the error is harmless.[23] But error in denying nominal damages is not always harmless, even if they do not entitle to

[18] 1 Bing. N. C. 549.

[19] 4 Barn. & Adol. 410.

[20] In admiralty, where the costs are in the discretion of the court, nominal damages are not always given for a technical wrong. Barnett v. Luther, 1 Curt. 434, Fed. Cas. No. 1,025.

[21] Potter v. Mellen, 36 Minn. 122, 30 N. W. 438; Enos v. Cole, 53 Wis. 235, 10 N. W. 377; Sayles v. Bemis, 57 Wis. 315, 15 N. W. 432; Eaton v. Lyman, 30 Wis. 41; French v. Ramge, 2 Neb. 254; Chambers v. Frazier, 29 Ohio St. 362; Seat v. Moreland, 7 Humph. 575; Middleton v. Jerdee, 73 Wis. 39, 40 N. W. 629.

[22] New Orleans, M. & T. R. Co. v. Southern & A. Tel. Co., 53 Ala. 211; McAllister v. Clement, 75 Cal. 182, 16 Pac. 775; Ely v. Parsons, 55 Conn. 83, 101, 10 Atl. 499; McIntosh v. Lee, 57 Iowa, 356, 10 N. W. 895; Thorp v. Bradley, 75 Iowa, 50, 39 N. W. 177; Faulkner v. Closter, 79 Iowa, 15, 44 N. W. 208; Haven v. Beidler Manuf'g Co., 40 Mich. 286; Harris v. Kerr, 37 Minn. 537, 35 N. W. 379; French v. Ramge, 2 Neb. 254; Middleton v. Jerdee, 73 Wis. 39, 40 N. W. 629; Benson v. President, etc., of Village of Waukesha, 74 Wis. 31, 41 N. W. 1017; Hecht v. Harrison (Wyo.) 40 Pac. 306; Crawford v. Bergen (Iowa) 60 N. W. 205. Where nominal damages are found on insufficient evidence, a new trial will not be granted. Maher v. Winona & St. P. R. Co., 31 Minn. 401, 18 N. W. 105.

[23] Singer Manuf'g Co. v. Potts (Minn.) 61 N. W. 23

costs. Regard must be had to the real purpose and object of the suit. If it was instituted to try some question of permanent right, and the party is found entitled to that right, but it happens that only nominal damages can be given, there is no objection to giving a new trial, for the error is not harmless; but if the party has failed in the substantial object of the suit, and has left only a bare technical right to recover nominal damages, a new trial will not be awarded him for that purpose.[24] Thus, it was held, in an action of trespass against a selectman for cutting trees alleged to obstruct a highway, where the main object of the action was to determine whether or not there had been a dedication of such highway, and the question of dedication was found in favor of the defendant, that error of the trial court in refusing the plaintiff nominal damages for the trees improperly cut was not ground for a new trial. The court said: "The complaint in this suit was manifestly brought to determine whether the plaintiff had a right to the land which was in use for a highway. If error had intervened tending to defeat him in the establishment of this right, the finding that his damages were merely nominal would have constituted no objection to a new trial. But the plaintiff entirely failed in the real object of the suit, but, by reason of the accidental cutting of some brush and trees not necessary to make the highway passable, he has a bare technical right to nominal damages. But substantial justice has been done. That a new trial must be denied under these circumstances is abundantly sustained by the uniform tenor of the decisions in this state and elsewhere."[25]

[24] Knowles v. Steele (Minn.) 61 N. W. 557.

[25] Ely v. Parsons, 55 Conn. 83, 101, 10 Atl. 499. See, also, Merrill v. Dibble, 12 Ill. App. 85; Shipman v. Horton, 17 Conn. 487; Gold v. Ives, 29 Conn. 123; Cooke v. Barr, 39 Conn. 306; Briggs v. Morse, 42 Conn. 260; Hyatt v. Wood, 3 Johns. 239; Hudspeth v. Allen, 26 Ind. 165; Plumleigh v. Dawson, 1 Gilman, 544. On general subject of nominal damages, see, also, Ashby v. White, 2 Ld. Raym. 938; Kidder v. Barker, 18 Vt. 454; Clifton v. Hooper, 6 Q. B. 468; Baker v. Green, 2 Bing. 317; Williams v. Mostyn, 4 Mees. & W. 145; Young v. Spencer, 10 Barn. & C. 145; Embrey v. Owen, 6 Exch. 353, 372; Williams v. Esling, 4 Pa. St. 486; Seneca Road Co. v. Auburn & R. R. Co., 5 Hill, 175; Bustamente v. Stewart, 55 Cal. 115.

CHAPTER III.

COMPENSATORY DAMAGES.

18. Definition.
19–20. Proximate and Remote Consequences in General.
21. Direct and Consequential Losses.
22–23. Direct Losses.
24–25. Consequential Losses.
26. Proximate and Remote Consequential Losses.
27. Consequential Damages for Torts.
28. Consequential Damages for Breach of Contract.
29. Avoidable Consequences.
30. The Required Certainty of Damages.
31. Profits or Gains Prevented.
32. Entirety of Demand.
33. Time to Which Compensation may be Recovered—Past and Future Losses.
34–35. Elements of Compensation.
36. Pecuniary Losses.
37–38. Physical Pain and Inconvenience.
39–40. Mental Suffering.
41. Aggravation and Mitigation of Damages.
42. Reduction of Loss.
43. Injuries to Limited Interests.

DEFINITION.

18. Compensatory damages are damages sufficient in amount, in contemplation of law, to indemnify the person injured for the loss suffered.

Compensatory damages are either nominal or substantial. Nominal damages are legal compensation for a technical wrong, where no substantial damages are proved. Where damages are thus presumed, they may not strictly be called "compensatory," for they may be awarded though the injury results in a benefit. But they may be strictly coincident with the harm suffered.[1] Accordingly, they sometimes are, and sometimes are not, strictly compensatory.[2]

[1] Ante, p. 26.

[2] Jag. Torts, 367.

Nominal damages were considered in the last chapter. We will now consider the principles governing substantial compensation.

It has been seen that the cardinal principle governing the award of damages both in cases of torts and breaches of contract is that plaintiff should receive a just compensation for the loss suffered. "The general rule is that whoever does an injury to another is liable in damages to the extent of that injury." [3] But legal compensation often falls far short of actual indemnity.[4] The law does not and cannot give compensation for all the consequences of a wrongful act, nor can damages be recovered for mere inconvenience, vexation, or disappointment.[5] The law prescribes what elements shall be considered in estimating legal compensation. Where the loss can be calculated by arithmetical rule and pecuniary standards, the amount of compensation is a question of law. Where

[3] Dexter v. Spear, 4 Mason, 115, Fed. Cas. No. 3,867. "It is a rational and a legal principle that the compensation should be equivalent to the injury." Bussy v. Donaldson, 4 Dall. 206. "It is a general and very sound rule of law that when an injury has been sustained, for which the law gives a remedy, that remedy shall be commensurate to the injury sustained." Rockwood v. Allen, 7 Mass. 254. "By the general system of our law, for every invasion of right there is a remedy, and that remedy is compensation. This compensation is furnished in the damages which are awarded." Sedg. Dam. 28.

[4] "It has been contended that the true measure of damages, in all actions of covenant, is the loss actually sustained. But this rule is laid down too generally. In an action of covenant for nonpayment of money on a bond or mortgage, no more than the principal and legal interest of the debt can be recovered, although the plaintiff may have suffered to a much greater amount by the default of payment." Tilghman, C. J., in Bender v. Fromberger, 4 Dall. 436, 444. "Every defendant against whom an action is brought experiences some injury or inconvenience beyond what the costs will compensate him for." Brom, Leg. Max. 199. "But, although the law does not attempt the impossibility of replacing the plaintiff in exactly the position he was in before the injury, yet, within the bounds of possibility, its aim is compensation." Sedg. Dam, 50.

[5] Hamlin v. Great Northern Ry. Co., 1 Hurl. & N. 408; Hunt v. D'Orval, Dud. (S. C.) 180. See Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052. "The injury must be physical, as distinguished from one purely imaginative; it must be something that produces real discomfort or annoyance, through the medium of the senses, not from delicacy of taste or a refined fancy." Bird, V. C., in Westcott v. Middleton, 43 N. J. Eq. 478, 486, 11 Atl. 490; Id., 44 N. J. Eq. 297, 18 Atl. 80. Damages may be recovered for incon-

the loss cannot be so estimated, as in cases of personal torts, the law merely prescribes what elements of injury shall be considered, and leaves the amount of compensation to the discretion of a jury.

PROXIMATE AND REMOTE CONSEQUENCES IN GENERAL.

19. For purposes of liability, the consequences of wrongful conduct may be divided into

(a) Proximate consequences (p. 39), **and**

(b) Remote consequences (p. 39).

20. Compensation may be recovered only for proximate losses resulting from wrongful conduct, and never for any losses which are remote.

Where compensation is claimed for losses alleged to have been caused by the wrongful conduct of another, the first question is whether the conduct complained of was really the cause of the harm in a sense upon which the law can act. The harm may be traceable to the conduct, but the connection may be, in the accustomed phrase, too remote. "In jure non remota causa sed proxima spectatur." As has been seen, liability must be founded on conduct which is the proximate cause of the harm. Again, there may have been an undoubted wrong, but it may be doubtful how much of the harm is related to the wrongful conduct as its proximate consequence, and therefore is to be counted in estimating the wrongdoer's liability. The distinction of proximate from remote consequences is necessary—First, to ascertain whether there is any liability at all; and, second, if a wrong is established for which the defendant is liable, to fix the limit of liability or measure of damages.[6] "Much the same considerations are involved whether the attempt is to show that the injury itself is remote from the act

venience amounting to physical discomfort. Chicago & A. R. Co. v. Flagg, 43 Ill. 364; Southern Kan. Ry. Co. v. Rice, 38 Kan. 398, 16 Pac. 817; Emery v. City of Lowell, 109 Mass. 197; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695; Luse v. Jones, 39 N. J. Law, 707; Ives v. Humphreys, 1 E. D. Smith, 196; Scott Tp. v. Montgomery, 95 Pa. St. 444.

[6] Pol. Torts, 27.

or only certain consequences of the injury. These classes of cases are often difficult to distinguish in practice; and both are to some extent involved in the consideration of nominal damages, where they shade into one another. Besides this, a case turning on the right of action may frequently be a precedent for the decision of a case involving the measure of damages." [7]

It has been said that the term "proximate cause" is not capable of perfect or general definition,[8] and the confusion and uncertainty in the authorities justify the remark. The maxim, "Non remota causa sed proxima causa spectatur," merely points out that some consequences are held too remote to be counted. The test of remoteness is still to be found.[9]

DIRECT AND CONSEQUENTIAL LOSSES.

21. For the purpose of determining what consequences are proximate and what remote, the losses caused by a wrong may be divided into

(a) Direct (p. 36)**, and**

(b) Consequential losses (p. 39)**.**

[7] Sedg. Dam. 163.

[8] Pol. Torts, 28.

[9] "The question as to what is the direct or proximate cause of an injury is ordinarily not one of science or legal knowledge, but of fact, for a jury to determine in view of the accompanying circumstances." Schumaker v. St. Paul & D. R. Co., 46 Minn. 39, 48 N. W. 559. The test of the most conspicuous antecedent, suggested by John Stuart Mill, has been recognized. "The cause of an event is the sum total of the contingencies of every description, which, being realized, the event invariably follows. It is rarely, if ever, that the invariable sequence of events subsists between one antecedent and one consequent. Ordinarily, that condition is usually termed the cause whose share in the matter is most conspicuous, and is the most immediately preceding and proximate in the event." Appleton, C. J., in Moulton v. Inhabitants of Sanford, 51 Me. 127, 134. See, also, Dole v. Insurance Co., 2 Cliff. 431, Fed. Cas. No. 3,966; Baltimore & P. R. Co. v. Reaney, 42 Md. 117; Northwest Transp. Co. v. Boston Marine Ins. Co., 41 Fed. 802; Sutton v. Town of Wauwatosa, 29 Wis. 21. But see Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568; Gates v. Railroad Co., 39 Iowa, 45.

SAME—DIRECT LOSSES.

22. Direct losses are such losses as proceed immediately from wrongful conduct, without the intervention of any intermediate cause.[10]

23. Direct losses are necessarily proximate, and compensation therefor is always recoverable.

Direct Losses.

A tort feasor is liable for all injuries resulting directly from his wrongful act, whether they could or could not have been foreseen by him.[11] The justice and propriety of this rule are manifest. If one man strike another with a weapon or with his hand, he is clearly liable for all the direct injury the party struck sustains therefrom. The fact that the result of the blow is unexpected and unusual can make no difference. If the wrongdoer should in fact intend but slight injury, and deal a blow which in 99 cases out of 100 would result in a trifling injury, and yet, by accident, produced a very grave one to the person receiving it, owing either to the state of health or other accidental circumstances of the party, such fact would not relieve the wrongdoer from the consequences of his act. The real question in these cases is, did the wrongful conduct produce the injury complained of? and not whether the party committing the act could have anticipated the result. The fact that the conduct is unlawful renders him liable for all its direct evil consequences.[12] Direct consequences are necessarily proximate. One is conclusively presumed to intend

[10] Schumaker v. St. Paul & D. R. Co., 46 Minn. 39, 48 N. W. 559.

[11] Cogdell v. Yett, 1 Cold. 230; Tally v. Ayres, 3 Sneed, 677; Bowas v. Pioneer Tow Line, 2 Sawy. 21, Fed. Cas. No. 1,713; Perley v. Eastern R. Co., 98 Mass. 414; Lane v. Atlantic Works, 111 Mass. 136; Blake v. Lord, 16 Gray, 387; Sloan v. Edwards, 61 Md. 89; Eten v. Luyster, 60 N. Y. 252; Lathers v. Wyman, 76 Wis. 616, 45 N. W. 669; Newsum v. Newsum, 1 Leigh, 86; Keenan v. Cavanaugh, 44 Vt. 268; Little v. Boston & M. R. R., 66 Me. 239; Brown v. Chicago, M. & St. P. Ry. Co., 54 Wis. 342, 11 N. W. 356; Lowenstein v. Chappell, 30 Barb. 241; Horner v. Wood, 16 Barb. 389; Schumaker v. St. Paul & D. R. Co., 46 Minn. 39, 48 N. W. 559.

[12] Brown v. Chicago, M. & St. P. Ry. Co., 54 Wis. 342, 11 N. W. 356.

the direct consequences of one's acts. Thus, it was held in a civil action for assault, where defendant had intentionally kicked plaintiff on the leg during school hours, though he did not intend to injure him, that, the act being unlawful, defendant was liable for the injury which in fact resulted, though it could not have been foreseen.[13] So, also, a sleeping-car company is liable for a miscarriage caused by the wrongful expulsion of a married woman from a berth, though its servants were ignorant of her delicate condition.[14] And generally, where the previous physical condition is such as to increase the loss caused by a personal injury, the wrongdoer, though unaware of such condition, is, nevertheless, liable for the whole loss caused, as such loss is the direct, though unexpected, consequence of the wrong.[15]

[13] Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403.

[14] Mann Boudoir-Car Co. v. Dupre, 4 C. C. A. 540, 54 Fed. 646. Contra, Pullman Palace-Car Co. v. Barker, 4 Colo. 344,—a case much criticised, and opposed to all the other authorities. See, also, Campbell v. Pullman Palace-Car Co., 42 Fed. 484; Barbee v. Reese, 60 Miss. 906; Oliver v. Town of La Valle, 36 Wis. 594; Brown v. Chicago, M. & St. P. Ry. Co., 54 Wis. 342, 11 N. W. 356, 911.

[15] Terre Haute & I. R. Co. v. Buck, 96 Ind. 346; Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551, 9 N. E. 476; Ohio & M. R. Co. v. Hecht, 115 Ind. 443, 17 N. E. 297; Lapleine v. Steamship Co., 40 La. Ann. 661, 4 South. 875; Baltimore City Pass. Ry. Co. v. Kemp, 61 Md. 74, 7 Atl. 805; Baltimore & L. T. Co. v. Cassell, 66 Md. 419, 7 Atl. 805; Elliott v. Van Buren, 33 Mich. 49; Jewell v. Grand Trunk Ry., 55 N. H. 84; Stewart v. City of Ripon, 38 Wis. 584; McNamara v. Village of Clintonville, 62 Wis. 207, 22 N. W. 472; Coleman v. New York & N. H. R. Co., 106 Mass. 160; Allison v. Chicago & N. W. R. Co., 42 Iowa, 274; Driess v. Friederick, 73 Tex. 460, 11 S. W. 493; East Tennessee, V. & G. R. Co. v. Lockhart, 79 Ala. 315; Tice v. Munn, 94 N. Y. 621; Owens v. Kansas City, St. J. & C. B. R. Co. (Mo. Sup.) 8 S. W. 350; Louisville & N. R. Co. v. Northington (Tenn.) 17 S. W. 880; Jackson v. Railroad Co., 25 Am. & Eng. R. Cas. 327; Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 14 N. E. 572; Indianapolis, P. & C. R. Co. v. Pitzer (Ind. Sup.) 6 N. E. 310; Louisville, N. A. & C. Ry. Co. v. Jones (Ind. Sup.) 9 N. E. 476; Indianapolis, P. & C. R. Co. v. Pitzer (Ind. Sup.) 10 N. E. 70; Wabash, St. L. & P. Ry. Co. v. Locke (Ind. Sup.) 14 N. E. 391; Brown v. Railway Co. (Wis.) 11 N. W. 356; Beauchamp v. Saginaw Mining Co. (Mich.) 15 N. W. 65; McNamara v. Village of Clintonville (Wis.) 22 N. W. 472; Cincinnati, L., St. L. & C. R. Co. v. Cooper (Ind. Sup.) 22 N. E. 340; White Sewing-Mach. Co. v. Richter (Ind. App.) 28 N. E. 146; Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, and 4 N. E. 908, followed in Ohio & M. R. Co. v.

In actions of contract the rule is the same.[16] Whether the parties to the contract had in mind the damages which might result from a breach does not in the least affect their liability for a loss resulting directly from a breach.[17] The direct consequence of a breach of contract is a loss of the thing contracted for, and is therefore almost necessarily contemplated by the parties. Still, in some cases, the extent of the damage is unexpected, but compensation is recoverable, nevertheless, if the loss is direct. Thus, in an action for breach of a contract of carriage, the carrier is liable for the value of a package lost, though ignorant of the fact that it contained jewels.[18]

Hecht, supra; Vandenburgh v. Truax, 4 Denio, 464. See, also, cases collected in Clark v. Chambers, 3 Q. B. Div. 327, 47 Law J. Q. B. 427; Crane Elevator Co. v. Lippert, 11 C. C. A. 521, 63 Fed. 942. "Where a disease caused by the injury supervenes, as well as where the disease exists at the time, and is aggravated by it, the plaintiff is entitled to full compensatory damages." The negligence causing the accident is the proximate cause of the injury. Louisville, N. A. & C. Ry. Co. v. Snyder, 117 Ind. 435, 20 N. E. 284.

[16] Hadley v. Baxendale, 9 Exch. 341; Burrell v. New York & S. S. Salt Co., 14 Mich. 34; Brown v. Foster, 51 Pa. St. 165; Collard v. Southeastern R. Co., 7 Hurl. & N. 79; Williams v. Vanderbilt, 28 N. Y. 217; Smith v. St. Paul, M. & M. Ry. Co., 30 Minn. 169, 14 N. W. 797; Rhodes v. Baird, 16 Ohio St. 581; Brayton v. Chase, 3 Wis. 456; Bridges v. Stickney, 38 Me. 361; Paducah Lumber Co. v. Paducah Water-Supply Co., 89 Ky. 340, 12 S. W. 554; Wilson v. Dunville, 6. L. R. Ir. 210; Hamilton v. Magill, 12 L. R. Ir. 186, 202; Booth v. Spuyten Duyvil Rolling-Mill Co., 60 N. Y. 487; Gallup v. Miller, 25 Hun, 298; Louisville, N. A. & C. Ry. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404; Louisville, N. A. & C. Ry. Co. v. Power, 119 Ind. 269, 21 N. E. 751; Houser v. Pearce, 13 Kan. 104. See Prosser v. Jones, 41 Iowa, 674; McHose v. Fulmer, 73 Pa. St. 365; Wilkinson v. Davies, 146 N. Y. 25, 40 N. E. 501.

[17] Sedg. Dam. 159, 161; Collins v. Stephens, 58 Ala. 543; Daughtery v. American Union Tel Co., 75 Ala. 168; Cohn v. Norton, 57 Conn. 480, 492, 18 Atl. 595.

[18] Kenrig v. Eggleston (1648) Aleyn, 93; Little v. Boston & M. R. R., 66 Me. 239. See, also, Mather v. American Exp. Co., 138 Mass. 55; France v. Gaudet, L. R. 6 Q. B. 199; Wilson v. Railway Co., 9 C. B. (N. S.) 632; Starbird v. Barrows, 62 N. Y. 615.

SAME—CONSEQUENTIAL LOSSES.

24. Consequential losses are the indirect losses caused by a wrong, but to which some intermediate cause has contributed.

25. Consequential losses may be either

(a) Proximate (p. 39), **or**

(b) Remote (p. 39).

26. PROXIMATE AND REMOTE CONSEQUENTIAL LOSSES—Consequential losses are proximate when the natural and probable effect of the wrongful conduct under the circumstances is to set in operation the intervening cause from which the loss directly results. When such is not the natural and probable effect of the wrongful conduct, the losses are remote.

Consequential Losses in General.

"A loss which is the immediate result of a wrong is called a 'direct loss'; one that is an indirect result of the wrong is called a 'consequential loss.'" [19] For example, where a fence is destroyed,

[19] Sedg. Dam. § 111. According to the supreme court of New Hampshire, the term "consequential damage" "means both damage which is so remote as not to be actionable, and damage which is actionable. Sometimes it is used to denote damage which, though actionable, does not follow immediately, in point of time, upon the doing of the act complained of. * * * It is thus used to signify damage which is recoverable at common law, in an action of case, as contradistinguished from an action of trespass. On the other hand, it is used to denote a damage which is so remote a consequence of the act that the law affords no remedy to recover it. The terms 'remote damages' and 'consequential damages' are not necessarily synonymous, or to be indifferently used." Eaton v. Railroad, 51 N. H. 504, 519. And again: "A damage caused by a breach of a contract is often called consequential (in the technical sense of being a consequence so remote or unexpected as not to entitle the sufferer to redress) where it cannot reasonably be supposed to have been contemplated by the parties, in making the contract, as likely to be caused by the breach; and in tort a damage is often called consequential when it was not a reasonably necessary consequence, or one so natural and probable that the defendant can be reasonably supposed to have foreseen the likelihood of its having been caused by the wrong complained of." Thompson v. Improvement Co., 54 N. H. 545.

loss of the fence is the direct result. Loss of the crops by reason of trespassing cattle entering at the gap is indirect or consequential. Pain and bruises are the direct result of an assault and battery. The doctor's bill, loss of time, and the like, are consequential. Consequential losses differ from direct losses in this: that some intermediate cause has contributed to the injury. Whether or not compensation can be recovered for such losses will depend on the nature of the intervening cause. The damages recoverable for either a tort or a breach of contract must result without the intervention of any independent cause. In many of the cases the presence or absence of an "independent self-operating cause" is proposed as a test of what is proximate and what remote. But an intervening cause is not regarded as independent when the natural and probable effect of the conduct complained of is to set it in operation. Proximate consequences, therefore, are simply those that are natural and probable.* "Natural" and "probable" means what, according to common experience and the usual course of events, should be expected to happen. Every one is conclusively presumed to know and contemplate the natural and probable result of their acts.[20] The rule of natural and probable consequences is a vague one; but, as Sir Frederick Pollock has said,[21] if English law seems vague on these questions, it is because it is grappled more closely with the inherent vagueness of facts than any other system. In whatever form the rule is stated, it must be remembered that it is not a logical definition, but only

* Whether or not a given result is natural and probable is for the jury. Haverly v. State Line & S. R. Co., 135 Pa. St. 50, 19 Atl. 1013. "Ordinarily, in cases of contract, the question is not one of liability for proximate cause, but of consequential damages. The breach of contract establishes liability, and the question of the allowance of any item of damage is practically one of the interpretations of the contract, and consequently for the court." Sedg. El. Dam. 64, citing Hobbs v. Railroad Co., L. R. 10 Q. B. 111, 122; Hammond v. Bussey, 20 Q. B. Div. 79, 89. In an action of contract, Blackburn, J., said: "I do not think that the question of remoteness ought ever to be left to a jury. That would be, in effect, to say that there shall be no such rule as to damages being too remote." Hobbs v. London & S. W. R. Co., L. R. 10 Q. B. 111.

[20] Suth. Dam. 32.

[21] Pol. Torts, 33.

a guide to the exercise of common sense. "The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause." The practical application of any rule is a matter of great difficulty. Different courts, though equally acknowledging the same principles, have sometimes reached diverse conclusions on similar states of facts. When the best possible rule is stated, each case must still be decided upon its own special state of facts, and often upon the nicest discriminations. "While in many cases the rule of damages is plain and easy of application, there are many others in which, from the nature of the subject-matter and the peculiar circumstances, it is very difficult, and in some cases impossible, to lay down any definite, fixed rule of law by which the damages actually sustained can be estimated with a reasonable degree of accuracy, or even a probable approximation to justice; and the injury must be left wholly or in great part unredressed, or the question must be left to the good sense of the jury upon all the facts and circumstances of the case, aided by such advice and instructions from the court as the peculiar facts and circumstances of the case may seem to require. But the strong inclination of the courts to administer legal redress upon fixed and certain rules has sometimes led to the adoption of such rules in cases to which they could not be consistently or justly applied. Hence there is, perhaps, no branch of the law upon which there is a greater conflict of judicial decisions, and none in which so many merely arbitrary rules have been adopted. We are compelled to say that the line of mere authority upon questions of damages like that here presented, if any such line can be traced through the conflict of hostile decisions, is too confused and tortuous to guide us to a safe or satisfactory result, without resort to the principles of natural justice and sound policy which underlie these questions, and which have sometimes been overlooked or obscured by artificial distinctions and arbitrary rules." [22]

The difficulty in stating and applying any practical rule has been much increased by the failure of courts to always use terms with precision and consistency. The distinction between proxi-

[22] Allison v. Chandler, 11 Mich. 542, Mech. Cas. Dam. 99.

mate and remote consequences is often confounded with considerations of certainty and uncertainty of loss. Compensation for remote losses is refused, not because the loss is not in one sense caused by the wrong, but for reasons of public policy, and because the chain of causation cannot be followed with sufficient certainty. No cause can operate without being influenced by other causes. So, also, no cause is without an effect, which, in turn, becomes the cause of a further effect, and so on to infinity. Liability for consequences must end somewhere, and the law has fixed this limit at the natural and probable consequences. Compensation is recoverable for consequential losses only when they are proximate. Consequential losses are proximate only when they are natural and probable. Consequences are natural and probable only when, according to common experience and the usual course of events, the effect of the wrongful conduct was to set in operation the intermediate cause; that is to say, when the intermediate cause was not independent. It is just here that the difficulty lies. No effect is the product of a single isolated cause, but rather of innumerable co-existing causes. In one sense, every cause is the sum of all the antecedents, for no particular event could have happened if any one of innumerable necessary conditions had been absent. Mr. Wharton [23] states the case of a haystack fired by a spark from a passing engine. If the railroad had not been built, an event depending on an almost infinite number of conditions (among them, the discovery of coal and iron), or if the haystack had not been erected, an event also dependent on innumerable conditions, no fire would have occurred. Each one of such conditions may therefore be regarded as a cause of the injury, for without it the fire could not have happened. In this view, every antecedent event is a cause of every subsequent one. It is obvious that the law cannot concern itself with such metaphysical refinements. When an efficient adequate cause of an injury is found, it must be taken as the true cause, unless some other independent cause is shown to have intervened between it and the injury.[24] The inquiry is always whether there was any intermediate cause disconnected from

[23] Whart, Neg. § 85.

[24] Georgetown, B. & L. Ry. Co. v. Eagles, 9 Colo. 545, 13 Pac. 696. See also, Blythe v. Denver & R. G. Ry. Co., 15 Colo. 333, 25 Pac. 702.

the primary fault, and self-operating, which produced the injury.[25] If there was, then such intermediate cause must be regarded as the proximate cause, and all antecedent causes as remote. The nature of the intervening cause is the all-important and decisive question. If it is independent of defendant's fault, and such that without it the injury would not have happened, the loss is remote, though defendant's act contributed to it.[26] In all cases, it is, of

[25] Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469. If the injury received by the plaintiff through the negligence of the defendant superinduced and contributed to the production or development of a cancer, the defendant is responsible therefor, and the cancer is not to be treated as an independent cause of injury or suffering. The wrongdoer cannot be allowed to apportion the measure of his responsibility to the initial cause. Baltimore City Pass. Ry. Co. v. Kemp, 61 Md. 619.

[26] Where plaintiff was induced by false representations to put money in a speculation, and afterwards put in more money, the loss of the latter money was held a proximate consequence of the fraud. Crater v. Binninger, 33 N. J. Law, 513. Injury to plaintiff's mill and machinery, caused by a boiler explosion, is a proximate consequence of defects in the boiler. Page v. Ford, 12 Ind. 46; Erie City Iron Works v. Barber, 106 Pa. St. 125. Where defendant abducted plaintiff's slaves, leaving no one to care for the plantation, it was held that compensation could be recovered for corn destroyed by cattle of the neighbors, and for wood swept away by a flood. McAfee v. Crofford, 13 How. 447. A loss through deprivation of means of protection is proximate. Derry v. Flitner, 118 Mass. 131; The George and Richard, L. R. 3 Adm. & Ecc. 466; Wilson v. Newport Dock Co., L. R. 1 Exch. 177. Borradaile v. Brunton, 8 Taunt. 535; 2 Moore, 582. But see Hadley v. Baxendale, 9 Exch. 341, 347. A defect in a fence is a proximate cause of a trespass by cattle and injury to crops. Scott v. Kenton, 81 Ill. 96. It is natural and probable that a trespassing horse will kick other horses on the premises. Lee v. Riley, 34 Law J. C. P. 212; Lyons v. Merrick, 105 Mass. 71. Where plaintiff's horses escaped through the defect, and were killed by the falling of a haystack on defendant's premises, the loss was held not too remote. Powell v. Salisbury, 2 Younge & J. 391. Where cattle escaped, and ate branches of a yew tree, and were thereby poisoned, the loss is the proximate result of the defect. Lawrence v. Jenkins, L. R. 8 Q. B. 274. Where defendant's wrong obliges plaintiff to raise money, a loss through a forced sale of property is too remote to be compensated. See Deyo v. Waggoner, 19 Johns. 241; Donnell v. Jones, 13 Ala. 490; Cochrane v. Quackenbush, 29 Minn. 376, 13 N. W. 154; Larios v. Gurety, L. R. 5 P. C. 346; Travis v. Duffau, 20 Tex. 49; Smith v. O'Donnell, 8 Lea, 468. Selling animals with an infectious disease is the proximate cause of its communication to other animals of the purchaser. Wheeler v. Randall, 48 Ill. 182; Sherrod v. Langdon, 21 Iowa, 518; Joy v. Bitzer, 77 Iowa, 73, 41 N. W. 575; Broquet v.

course, prerequisite to any liability that defendant's act had an influence in causing the injury.[27] There must be an immediate and natural relation between the act complained of and the in-

Tripp, 36 Kan. 700, 14 Pac. 227; Faris v. Lewis, 2 B. Mon. 375; Bradley v. Rea, 14 Allen, 20; Long v. Clapp, 15 Neb. 417, 19 N. W. 467; Jeffrey v. Bigelow, 13 Wend. 518; Wintz v. Morrison, 17 Tex. 372; Routh v. Caron, 64 Tex. 289; Packard v. Slack, 32 Vt. 9; Smith v. Green, 1 C. P. Div. 92. Loss of business caused by the deprivation of machinery or of business premises is usually considered proximate. Waters v. Towers, 8 Exch. 401; New York & C. Mining Syndicate & Co. v. Fraser, 130 U. S. 611, 9 Sup. Ct. 665; Jolly v. Single, 16 Wis. 280; Savannah, F. & W. Ry. Co. v. Pritchard, 77 Ga. 412, 1 S. E. 261; Van Winkle v. Wilkins, 81 Ga. 93, 7 S. E. 644; Sitton v. MacDonald, 25 S. C. 68; New Haven Steam-Boat Co. v. Mayor, etc., 36 Fed. 716; Moore v. Davis, 49 N. H. 45; Carlisle v. Callahan, 78 Ga. 320, 2 S. E. 751; Lange v. Wagner, 52 Md. 310. But see Vedder v. Hildreth, 2 Wis. 427, and Ruthven Woolen Manuf'g Co. v. Great Western R. Co., 18 U. C. C. P. 316. Loss of goods by sudden flood is not a proximate consequence of a negligent delay by a carrier. Denny v. New York Cent. R. Co., 13 Gray, 481; Morrison v. Davis, 20 Pa. St. 171; Railroad Co. v. Reeves, 10 Wall. 176. See post, note 68. Where a defect in the street causes a traveler to be thrown out of his carriage, and exposed to the cold and rain, the city is liable for a serious disease thereby contracted. Ehrgott v. Mayor, etc., 96 N. Y. 264. In an action on a fire insurance policy, the judge, in his charge to the jury, stated the theory of plaintiff as follows: "The plaintiff says the position of the lightning arresters in the vicinity of the fire was such that by reason of the fire in the tower a connection was made between them, called a 'short circuit'; that the short circuit resulted in keeping back, or in bringing into the dynamo below, an increase of electric current, that made it more difficult for this armature to revolve than before, and caused a higher power to be exerted upon it, or at least caused greater resistance to the machinery; that this resistance was transmitted to the pulley by which this armature was run, through the belt; that that shock destroyed that pulley; that by the destruction of that pulley the main shaft was disturbed, and the succeeding pulleys, up to the jack pulley, were ruptured; that by reason of pieces flying from the jack pulley, or from some other cause, the fly wheel of the engine was destroyed, the governor broken, and everything crushed,—in a word, that the short circuit in the tower by reason of the fire caused an extra strain upon the belt, through the action of electricity, and that caused the damage." It was held that the loss was a natural and proximate consequence of the fire, and recoverable. Lynn Gas & Electric Co. v. Meriden Fire Ins. Co., 158 Mass. 570, 33 N. E. 690.

[27] Royston v. Illinois Cent. R. Co., 67 Miss. 376, 7 South. 320; Jackson v. Hall, 84 N. C. 489; Wulstein v. Mohlman (Super. N. Y.) 5 N. Y. Supp. 569; Ellis v. Cleveland, 55 Vt. 358; Huxley v. Berg, 1 Starkie, 98; Hampton v.

jury, without the intervention of other independent causes, or the damages will be too remote.[28]

Illustrations of Proximate and Remote Consequences.

Where defendant destroyed the lateral support of a house by wrongfully excavating in a public street, he is liable for injuries to an adjoining house depending on the other for support,[29] no independent cause having intervened. A gas company contracted to supply plaintiff with a service pipe, and laid a defective pipe, from which gas escaped. A plumber employed by plaintiff took a lighted candle to discover from whence the gas escaped, and an explosion took place. The negligence of the gas company in laying a defective pipe was held the proximate cause of the explosion.[30] Here the injury could not have happened but for the intervening negligence of the plumber, but the obvious tendency of the original fault was to set in operation just such a force, and therefore the loss could not be regarded as remote. Where a village maintains a sidewalk at an unsafe height without guards it is liable for injuries to one who is negligently pushed off by a

Jones, 58 Iowa, 317, 12 N. W. 276; Swinfin v. Lowry, 37 Minn. 345, 34 N. W. 22; Lewis v. Flint & P. M. Ry., 54 Mich. 55, 19 N. W. 744 (cause and occasion. Opinion by Cooley, J., collecting and discussing cases). Where a 10 year old boy, while attempting to climb up a ladder attached to a box car of a moving train, lost his footing, and was thrown under the train and killed, his own negligence was the proximate cause of his death. There was no causal connection between the negligence of the company in running its train at a greater speed than allowed by ordinance, and the injury suffered. Western Ry. of Alabama v. Mutch, 97 Ala. 194, 11 South. 894. Money paid by a railroad company as damages and expenses of a suit brought against it for ejecting a passsenger who refused to pay fare, except by presenting a coupon issued by a connecting line without authority, cannot be recovered from the latter; for the only remedy, as against it, was to refuse to recognize the coupon, and the subsequent ejection, particularly if accompanied by unnecessary force, was not made legally necessary by its act in selling the ticket, but was upon the sole responsibility of the company causing the same. Pennsylvania R. Co. v. Wabash, St. L. & P. R. Co., 157 U. S. 225, 15 Sup. Ct. 576.

[28] Rucker v. Athens Manuf'g Co., 54 Ga. 84.

[29] Baltimore & P. R. Co. v. Reaney, 42 Md. 118.

[30] Burrows v. March Gas & Coke Co., 39 Law J. Exch. 33 L. R. 5 Exch. 67. See, also, Lannen v. Albany Gaslight Co., 44 N. Y. 459; Louisville Gas Co. v. Gutenkuntz, 82 Ky. 432.

third person;[31] but, where a town negligently leaves an excavation in a street, it is not liable to one who was willfully thrown into it by another.[32] The act of the latter was not a natural and probable effect of the act of the town. There was no causal connection between them. In Sharp v. Powell,[33] the defendant, contrary to a police regulation, had washed his wagon in the public street, allowing the water to run down the gutter, to a sewer which, under ordinary circumstances, would have carried it off. But the grating over the sewer was obstructed, and the water spread over the pavement, and froze, forming a sheet of ice. Plaintiff's horse, being led by, slipped on the ice, and broke its leg. Defendant did not know that the grating was obstructed. It was held that defendant was not liable, the court saying that the loss was too remote, because not one which defendant could fairly be expected to anticipate as likely to ensue from his act. The formation of the sheet of ice at the sewer was not a natural and probable result of defendant's wrong. The obstruction of the grating was an unusual circumstance.

The shooting of plaintiff's decedent while making an attack on a neighbor's house when drunk is not a natural and probable consequence of the liquor dealer's unlawful conduct in selling to him while intoxicated,[34] for independent causes intervened. Where an injury to a traveler on a highway is caused partly by a defective road and partly by ice with which it is covered, the defect in the road is the proximate cause of the injury.[35] The duty of the city is not affected by the fact that the ice is in part the result of artificial causes, as of water escaping from a hose, and not wholly of natural causes, such as the fall of rain.[36]

[31] Village of Carterville v. Cook, 129 Ill. 152, 22 N. E. 14.

[32] Alexander v. Town of New Castle, 115 Ind. 51, 17 N. E. 200.

[33] L. R. 7 C. P. 253, 41 Law J. C. P. 95. Cf. Chamberlain v. City of Oshkosh, 84 Wis. 289, 54 N. W. 618.

[34] Schmidt v. Mitchell, 84 Ill. 195. And see Bradford v. Boley (Pa. Sup.) 31 Atl. 751.

[35] City of Atchison v. King, 9 Kan. 550; City of Lincoln v. Smith, 28 Neb. 762, 45 N. W. 41.

[36] Henkes v. City of Minneapolis, 42 Minn. 530, 44 N. W. 1026. As to highway accidents generally, see Oliver v. Town of La Valle, 36 Wis. 592; Jackson

Where plaintiff could have avoided the injurious consequences of defendant's wrong, his negligence in failing to do so is regarded as the proximate cause of the damage, and the original fault is remote.[37] A carrier set plaintiff down a mile from her destination. The day was cold, and there was a line of street cars which plaintiff might have used, but she walked home, and, in so doing, caught cold, and suffered permanent injuries. The injury was held too remote, plaintiff's negligence in failing to take the street car having intervened and caused the injury.[38]

Where a human agency or the voluntary act of a person over whom defendant has no control intervenes after defendant's wrongful act, the consequences are usually remote.[39] But, where the act of the third party is a natural and probable result of defendant's acts, the loss is not too remote.[40] Loss of credit or custom involves the intervention of the will of strangers, and is therefore usually too remote.[41] But, where the wrongful conduct directly

v. Town of Bellevieu, 30 Wis. 250; Kelley v. Town of Fond du Lac, 31 Wis. 179; Moulton v. Inhabitants of Sanford, 51 Me. 127; Cobb v. Inhabitants of Standish, 14 Me. 198; Marble v. City of Worcester, 4 Gray, 395; Palmer v. Inhabitants of Andover, 2 Cush. 600; Davis v. Inhabitants of Dudley, 4 Allen, 557; Smith v. Smith, 2 Pick. 621; Horton v. City of Taunton, 97 Mass. 266, note; Hyatt v. Trustees of Village of Rondout, 44 Barb. 385; Sykes v. Pawlet, 43 Vt. 446; Bovee v. Danville, 53 Vt. 183.

[37] See post, "Avoidable Consequences."

[38] Francis v. St. Louis Transfer Co., 5 Mo. App. 7. See, also, Hobbs v. Railroad Co., L. R. 10 Q. B. 111; Indianapolis, B. & W. R. Co. v. Birney, 71 Ill. 391. But see Drake v. Kiely, 93 Pa. St. 492.

[39] Burton v. Pinkerton, L. R. 2 Exch. 340; Stone v. Codman, 15 Pick. 297; Schmidt v. Mitchell, 84 Ill. 195; Hampton v. Jones, 58 Iowa, 317, 12 N. W. 276; Ellis v. Cleveland, 55 Vt. 358; Mitchell v. Clarke, 71 Cal. 163, 11 Pac. 882; State v. Ward, 9 Heisk. 100, 133; Vicars v. Wilcocks, 8 East, 1, 2 Smith, Lead. Cas. Eq. 553, and exhaustive note. Loss of a situation is not a proximate consequence of an assault and battery. Brown v. Cummings, 7 Allen, 507.

[40] Griggs v. Fleckenstein, 14 Minn. 81 (Gil. 62); Billman v. Railroad Co., 76 Ind. 166; McDonald v. Snelling, 14 Allen, 292; 2 Greenl. Ev. §§ 256, 286, 286a; 3 Pars. Cont. 179, 180; Pig. Torts, 169.

[41] Lowenstein v. Monroe, 55 Iowa, 82, 7 N. W. 406; Weeks v. Prescott, 53 Vt. 57; Burnap v. Wight, 14 Ill. 301. See Alexander v. Jacoby, 23 Ohio St. 358; Dennis v. Stoughton, 55 Vt. 371; Pollock v. Gaunt, 69 Ala. 373. Contra, MacVeagh v. Bailey, 29 Ill. App. 606.

affects the credit or trade of plaintiff, the rule is otherwise.[42] A trespasser is liable for the injury caused by a crowd which he draws after him, if his act was of a nature to attract a destructive crowd.[43]

27. CONSEQUENTIAL DAMAGES FOR TORTS—Compensation may be recovered for all the consequential losses resulting from a tort which were natural and probable at the time the tort was committed (p. 49).

28. CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT—Compensation may be recovered only for such consequential losses resulting from a breach of contract as were natural and probable under the circumstances contemplated by the parties at the time the contract was made (p. 51).

Compensation can be recovered for consequential losses only when they are the natural and probable result of the wrongful conduct. Natural consequences are those which follow an act in the usual order of events, and which, therefore, might reasonably have been anticipated under the circumstances.[44] Whether the action is for a tort or a breach of contract, the loss must be the proximate result of the primary fault, or compensation cannot be recovered.[45] In determining whether the loss suffered is a proximate consequence, the test in both classes of cases is the same,—the natural and probable tendency of the wrongful conduct to produce the loss in question. But, in determining what consequential losses shall be compensated, there is an important distinction between cases of contract and cases of tort.[46] Liability for consequences is much more extended in the case of torts than of contracts. Compensation may be recovered for all the injurious consequences of a tort which result according to the usual order of events and gen-

[42] Boyd v. Fitt, 14 Ir. C. L. 43; Larios v. Gurety, L. R. 5 P. C. 346; Tarleton v. M'Gawley, Peake, N. P. 270.

[43] Fairbanks v. Kerr, 70 Pa. St. 86; Guille v. Swan, 19 Johns. 381.

[44] Ante, p. 40.

[45] Ante, pp. 4, 34.

[46] Suth. Dam. § 45.

eral experience, and which, therefore, at the time the tort was committed, the wrongdoer may reasonably be presumed to have anticipated.[47] But, for breach of contract, compensation may be recovered only for such consequential losses as are natural and probable under the circumstances contemplated by the parties at the time the contract was made; and it is wholly immaterial what consequences are natural and probable, or even actually contemplated at the time of the breach.[48] "For proximate and natural consequences of the defendant's act, whether it be a breach of contract or a tort, a recovery can always be had. The only meaning of the rule with regard to the contemplation of parties is that in contract a particular species of proof as to special consequences is often available, which is not so in tort." [49]

Consequential Damages for Torts.

Where, at the time a tort was committed, it might have been reasonably expected to set in operation the intermediate cause of an injury, or where it exposes plaintiff to the risk of injury from some fairly obvious danger, which ultimately results in injury, the loss is a natural and probable one, and may be compensated. The rule that compensation for consequential injuries caused by torts cannot be recovered unless they are such as could have been reasonably anticipated does not require the injury to have been actually foreseen.[50] It is simply another way of stating the rule

[47] Hoadley v. Transportation Co., 115 Mass. 304; Flori v. City of St. Louis, 69 Mo. 341; Forney v. Geldmacher, 75 Mo. 113; Hughes v. McDonough, 43 N. J. Law, 459; Wiley v. Railroad Co., 44 N. J. Law, 247; Warwick v. Hutchinson, 45 N. J. Law, 61; Chalk v. Railroad Co., 85 N. C. 423; Daniels v. Ballantine, 23 Ohio St. 532; Jackson v. Railroad Co., 13 Lea, 491; Borchardt v. Boom Co., 54 Wis. 107, 11 N. W. 440.

[48] Suth. Dam. § 45; Hadley v. Baxendale, 9 Exch. 341; Candee v. Telegraph Co., 34 Wis. 479; Pacific Exp. Co. v. Darnell, 62 Tex. 639; Thomas, B. & W. Manuf'g Co. v. Wabash, St. L. & P. R. Co., 62 Wis. 642, 22 N. W. 827; Smith v. Osborn, 143 Mass. 185, 9 N. E. 558; Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88; W. U. Tel. Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577; Weaver v. Penny, 17 Ill. App. 628; Packard v. Slack, 32 Vt. 9; Smith v. Green, 1 C. P. Div. 92; Riech v. Bolch, 68 Iowa, 526, 27 N. W. 507; McAlister v. Railroad Co., 74 Mo. 351; Jones v. Gilmore, 91 Pa. St. 310. See post, 51 et seq.

[49] Sedg. Dam. § 871.

[50] Suth. Dam. § 28; Bowas v. Tow Line, 2 Sawy. 21, Fed. Cas. No. 1,713.

that damages, to be recoverable, must be natural and probable; and it is misleading. "The damages are not limited or affected, so far as they are compensatory, by what was, in fact, in contemplation by the party in fault." [51] If a tort feasor expected the injury to result from his wrongful act, which in fact did result, he must be presumed to have intended to cause that particular injury; and the loss would be a direct rather than a consequential one, and compensation could be recovered on the principle already explained.[52] That which a man actually foresees is to him, at all events, natural and probable.[53] All that is required is that the injury be such as would probably result from such a tort under the circumstances.[54] Every person may reasonably be presumed to know what the consequences of their acts will be according to common experience and the usual course of nature, and required to guard against them.[55] To that extent, therefore, a wrongdoer

[51] Suth. Dam. § 16.

[52] Stevens v. Dudley, 56 Vt. 158, 166.

[53] Pol. Torts. 28.

[54] Whart. Neg. §§ 77, 78; Suth. Dam. § 16; Higgins v. Dewey, 107 Mass. 494; White v. Ballou, 8 Allen, 408; Luce v. Insurance Co., 105 Mass. 297; Stevens v. Dudley, 56 Vt. 158; Brown v. Railroad Co., 54 Wis. 342, 11 N. W. 356, 911; Terre Haute & I. R. Co. v. Buck, 96 Ind. 346; Winkler v. Railroad Co., 21 Mo. App. 99; Evans v. Railroad Co., 11 Mo. App. 463; Baltimore City P. R. Co. v. Kemp, 61 Md. 74; Hoadley v. Transportation Co., 115 Mass. 304; Ehrgott v. Mayor, etc., 96 N. Y. 264, 281; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469; Clark v. Chambers, 3 Q. B. Div. 327. It is enough that the damage is the natural, though not the necessary, result. Miller v. St. Louis, I. M. & S. Ry. Co, 90 Mo. 389, 2 S. W. 439; Baltimore City P. R. Co. v. Kemp, 61 Md. 74. But see Brown v. Chicago, M. & St. P. R. Co., 54 Wis. 342, 11 N. W. 356, 911, and Atkinson v. Transportation Co., 60 Wis. 141, 18 N. W. 764. See, also, Scheffer v. Railroad Co., 105 U. S. 249; Binford v. Johnston, 82 Ind. 426; Schmidt v. Mitchell, 84 Ill. 195; Eames v. Railroad Co., 63 Tex. 660; Campbell v. City of Stillwater, 32 Minn. 308, 20 N. W. 320; The Notting Hill, 9 Prob. Div. 105; Childress v. Yourie, Meigs (Tenn.) 561; Forney v. Geldmacher, 75 Mo. 113; Schrader v. Crawford, 94 Ill. 357.

[55] One who places another, whom he has made helplessly drunk, in charge of a horse, is presumed to have anticipated the injury which followed. Dunlap v. Wagner, 85 Ind. 529. See, also, Mead v. Stratton, 87 N. Y. 493; Bertholf v. O'Reilly, 8 Hun, 16; Id., 74 N. Y. 509; Aldrich v. Sager, 9 Hun, 537; Mulcahey v. Givens, 115 Ind. 286, 17 N. E. 598; Brink v. Railroad Co., 17 Mo. App. 177, 199.

is liable to any person injured by his wrongful acts. But no person can be required to guard against the extraordinary or unusual consequences of an act; and, there being no duty to guard against them, such losses are damnum absque injuria.[56] The loss—the damnum—is there, but the injuria is wanting.

Consequential Damages for Breach of Contract.

"There are some important considerations which tend to limit damages in an action upon contract, which have no application to those purely of tort. Contracts are made only by the mutual consent of the respective parties; and each party, for a consideration, thereby consents that the other shall have certain rights as against him, which he would not otherwise possess. In entering into the contract, the parties are supposed to understand its legal effect, and, consequently, the limitations which the law, for the sake of certainty, has fixed for the recovery of damages for its breach. If not satisfied with the risk which these rules impose, the parties may decline to enter into the contract, or may fix their own rule of damages, when, in their nature, the amount must be uncertain. Hence, when suit is brought upon such contract, and it is found that the entire damages actually sustained cannot be recovered without a violation of such rules, the deficiency is a loss, the risk of which the party voluntarily assumed on entering into the contract, for the chance of benefit or advantage which the

[56] A woman's illness, resulting from fright, is not the natural result of the shooting of a dog. Renner v. Canfield, 36 Minn. 90, 30 N. W. 435. Plaintiff was in bed, in her house. A quarrel between defendant and her husband so frightened her that she gave premature birth to a child. Defendant did not know of her proximity, nor of her condition. He was held not liable. Phillips v. Dickerson, 85 Ill. 11. See, also, Rich v. Railroad Co., 87 N. Y. 382; Allegheny v. Zimmerman, 95 Pa. St. 287; Louisville, N. A. & C. R. Co. v. Lucas, 119 Ind. 583, 21 N. E. 968; Johnson v. Drummond, 16 Ill. App. 611; Nelson v. Railroad Co., 30 Minn. 74, 14 N. W. 360; Royston v. Railroad Co., 67 Miss. 376, 7 South. 320; Jackson v. Hall, 84 N. C. 489; Wulstein v. Mohlman (Super. Ct.) 5 N. Y. Supp. 569; Ellis v. Cleveland, 55 Vt. 358; Huxley v. Berg, 1 Starkie, 98; Hampton v. Jones, 58 Iowa, 317, 12 N. W. 276; Phyfe v. Railroad Co., 30 Hun, 377; Teagarden v. Hetfield, 11 Ind. 522; Gamble v. Mullin, 74 Iowa, 99, 36 N. W. 909. Damages for loss of prospective offspring cannot be recovered in an action for negligence resulting in a miscarriage. Butler v. Railroad Co., 143 N. Y. 417, 38 N. E. 454.

contract would have given him in case of performance. His position is one in which he has voluntarily contributed to place himself, and in which, but for his own consent, he could not have been placed by the wrongful act of the opposite party alone.

"Again, in the majority of cases upon contract, there is little difficulty, from the nature of the subject, in finding a rule by which substantial compensation may be readily estimated; and it is only in those cases where this cannot be done, and where, from the nature of the stipulation or the subject-matter, the actual damages resulting from a breach are more or less uncertain in their nature, or difficult to be shown with accuracy by the evidence, under any definite rule, that there can be any great failure of justice by adhering to such rule as will most nearly approximate the desired result. And it is precisely in these classes of cases that the parties have it in their power to protect themselves against any loss to arise from such uncertainty, by estimating their own damages in the contract itself, and providing for themselves the rules by which the amount shall be measured in case of a breach; and, if they neglect this, they may be presumed to have assented to such damages as may be measured by the rules which the law, for the sake of certainty, has adopted.

"Again, in analogy to the rule that contracts should be construed as understood and assented to by the parties (if not as a part of that rule), damages which are the natural, and, under the circumstances, the direct and necessary, result of the breach, are often very properly rejected, because they cannot fairly be considered as having been within the contemplation of the respective parties at the time of entering into the contract. None of these several considerations have any bearing in an action purely of tort. The injured party has consented to enter into no relation with the wrongdoer by which any hazard of loss should be incurred; nor has he received any consideration or chance of benefit or advantage for the assumption of such hazard; nor has the wrongdoer given any consideration nor assumed any risk in consequence of any act or consent of his. The injured party has had no opportunity to protect himself by contract against any uncertainty in the estimate of damages. No act of his has contributed to the injury. He has yielded nothing by consent; and least of all has he con-

sented that the wrongdoer might take or injure his property, or deprive him of his rights, for such sum as, by the strict rules which the law has established for the measurement of damages in actions upon contract, he may be able to show, with certainty, he has sustained by such taking or injury. Especially would it be unjust to presume such consent, and to hold him to the recovery of such damages only as may be measured with certainty by fixed and definite rules, when the case is one which, from its very nature, affords no elements of certainty by which the loss he has actually suffered can be shown with accuracy by any evidence of which the case is susceptible. Is he to blame because the case happens to be one of this character? He has had no choice, no selection. The nature of the case is such that the wrongdoer has chosen to make it; and, upon every principle of justice, he is the party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case, and the difficulty of accurately estimating the results of his own wrongful act." [57]

Parties enter into contracts with a view to securing some advantage to themselves, and when one of them is, by the other's breach, deprived of the benefit which the latter contracted he should receive, the fundamental principle of compensation requires the damages for the breach to be in proportion to the benefit which was to have been received. For anything amounting to a direct breach of contract, whether foreseen or unforeseen, the party responsible therefor is liable, because he has contracted that the other party shall receive that very thing; but he is not liable for indirect or consequential losses resulting from the breach, unless they are such as the parties may reasonably be presumed to have contemplated at the time the contract was made.[58] The reason is obvious. Defendant's liability rests on the assumption that he has wrongfully

[57] Allison v. Chandler, 11 Mich. 542, Mech. Cas. Dam. 99.

[58] The use of the phrase that "damages must have been contemplated," or that they must be such as "the parties may be presumed to have contemplated," and the like, is too universal to be gotten rid of. The author conceives the phrase to mean simply that the benefits for loss of which plaintiff claims compensation must be such as the parties may be presumed to have contemplated.

deprived plaintiff of a benefit which he had contracted plaintiff should receive; but, as to benefits dependent on circumstances unknown to him, defendant has made no contract, and is therefore not liable for their loss.

Hadley v. Baxendale.

In Hadley v. Baxendale[59] an attempt was made to settle this branch of the law, and a rule was laid down to govern the award of damages for breach of contract, that has been generally accepted both in England and America.[60] In this case the plaintiffs were owners of a steam mill. The shaft was broken, and they gave it to the defendant, a carrier, to take to an engineer, to serve as a model for a new one. On making the contract, defendant's clerk was informed that the mill was stopped, and that the shaft must be sent immediately. He delayed its delivery; the shaft was kept back in consequence; and, in an action for breach of contract, plaintiffs claimed as special damages the loss of profits while the mill was kept idle. It was held that, if the carrier had been made aware that a loss of profits would result from a delay on his part, he would have been answerable. But, as it did not appear that defendant knew that the want of the shaft was the only thing which was keeping the mill idle, he could not be made responsible to such an extent. The court said: "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i. e. according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach

[59] 9 Exch. 341, 23 Law J. Exch. 179; 18 Jur. 358; 26 Eng. Law & Eq. 398.

[60] It is said in a note to Sedgwick on Damages (page 203) that so entirely is the later law founded on this case that the great body of cases since decided, involving the measure of damages for breach of contract, resolve themselves into a continuous commentary upon it.

of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great multitude of cases, not affected by any special circumstances, from such a breach of contract; for, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract." [61]

Three rules may be deduced from Hadley v. Baxendale: First, that damages which may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things, are always recoverable; secondly, that damages which would not arise in the usual course of things from a breach

[61] The statement of the rule is open to criticism, and, unexplained, is sometimes misleading: "What is meant by the words 'in contemplation of the parties'? It would seem that contracting parties—certainly honest ones—do not contemplate the breach of their contracts when they enter into them, and hence cannot contemplate the consequences of a breach. * * * We are aware that the language or phrase we have been criticising has been repeated and re-repeated in many judicial opinions. It has come to be almost a stereotyped phrase; so general that it may appear to be temerity in us to question its propriety. We think, however, it is in itself inapt and inaccurate, and that its import has been greatly and frequently misunderstood. It is often employed in apposition to, or as the synonym of, that other qualifying clause, 'the natural result of,' or 'in the usual course of things.' We think this a great departure from the sense in which Baron Alderson intended it should be understood. Altogether, we think it obscure and misleading, and that an attempt to install it as one of the canons has caused many, very many, erroneous rulings." Daughtery v. Telegraph Co., 75 Ala. 168, 176. Substantially the same criticism was made by Baron Martin, who participated in the decision of Hadley v. Baxendale, in Wilson v. Dock Co., L. R. 1 Exch. 177. In New York the phrase, "such as may fairly be supposed to have been in contemplation of the parties," is used as the equivalent of "the usual course of things." This has led to much confusion. See Sedg. Dam. 209.

of contract, but which do arise from circumstances peculiar to the special case, are not recoverable unless the special circumstances are known to the person who has broken the contract; thirdly, that where the special circumstances are known, or have been communicated to the person who breaks the contract, and where the damage complained of flows naturally from the breach of contract under those special circumstances, then such special damage must be supposed to have been contemplated by the parties to the contract, and is recoverable. A further rule is implied, viz. that damage which cannot be considered as fairly and naturally arising from breach of contract under any given circumstances is not recoverable, whether those circumstances were or were not known to the person who is being charged.[62]

First rule of Hadley v. Baxendale — Damages Arising under Ordinary Circumstances.

Under the rule of Hadley v. Baxendale, actual contemplation of the consequences of a breach of contract is not at all essential to liability, if the consequences are in fact natural ones. Under the doctrine of that case, damages may be recovered for both the natural consequences of the breach,—that is, such consequences as would ordinarily result from a breach of similar contracts,—and such consequences as seem natural only in the light of special circumstances communicated to defendant at the time the contract was made.[63] "It is presumed that the parties contemplate the usual and natural consequences of a breach when the contract is made; and, if the contract is made with reference to special circumstances fixing or affecting the amount of damages, such special circumstances are regarded as within the contemplation of the par-

[62] Mayne, Dam. 10.

[63] Sedg. Dam. § 148. See, also, Little v. Railroad Co., 66 Me. 239; Collard v. Railroad Co., 7 Hurl. & N. 79; Gee v. Railroad Co., 6 Hurl. & N. 211; Wilson v. Railroad Co., 9 C. B. (N. S.) 632; Wilson v. Dock Co., L. R. 1 Exch. 177; Baldwin v. Telegraph Co., 45 N. Y. 744, 750; Ward v. New York C. R. Co., 47 N. Y. 29, 32. In an action against a gaslight company for wrongfully refusing to furnish plaintiff's store with gas, damages may be recovered for inconvenience in transacting business, and for loss of business owing to the store being less attractive to customers. Shepard v. Gaslight Co., 15 Wis. 349.

ties, and damages may be assessed accordingly." [64] This is well illustrated by an English case.[65] The defendants had built a floating boom derrick, which had been left on their hands. Plaintiffs agreed to buy the hull of the derrick, which defendants were to empty of machinery, and deliver, by a certain date. Plaintiffs intended to place in the hull hydraulic cranes to transship coal from colliers to barges without the necessity of any intermediate landing. This purpose was entirely novel and unknown to defendants, who supposed that plaintiffs intended to use the hull for a coal store, which was the most obvious use to which such a vessel could be applied by a person in the coal trade, though the vessel itself, being the first of its kind ever built, was entirely novel, and had never been applied to such a purpose. If the vessel had been intended as a coal store, as defendants contemplated, plaintiffs would have been damaged £420 by its nondelivery at the time fixed; but they in fact suffered much greater damage, owing to preparations to use it in the manner for which it was bought. Plaintiffs conceded that this greater sum could not be recovered because such purpose was unknown to defendants; and defendants contended that, under the rule of Hadley v. Baxendale, even the £420 could not be recovered, because such loss resulted from inability to use the vessel in a manner not contemplated by plaintiffs. It was held, however, that defendants were liable for the £420, as that loss was the natural consequence of the breach; the use of the hull as a coal store being the most obvious use to which it was applicable. Blackburn, J., said: "That argument seems to assume that the principle laid down in Hadley v. Baxendale is that the damages can only be what both parties contemplated, at the time of making the contract, would be the consequence of the breach of it; but that is not the principle of Hadley v. Baxendale. The court say: 'We think the proper rule in such a case as the present is this: Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such

[64] Booth v. Spuyten Duyvil Rolling-Mill Co., 60 N. Y. 487, 492. See Devlin v. Mayor, etc., 63 N. Y. 8, 25.

[65] Cory v. Thames, I. W. & S. B. Co., L. R. 3 Q. B. 181, 188. See, also, Elbinger Actien-Gesellschafft für Fabrication von Eisenbahn Materiel v. Armstrong, L. R. 9 Q. B. 473, 43 Law J. Q. B. 211.

breach of contract should be such as may fairly and reasonably be considered, either arising naturally—i. e. according to the usual course of things—from such breach of contract itself' [that is one alternative], or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.' "[66]

The first rule of Hadley v. Baxendale—that is, that damages arising naturally from a breach of contract may be recovered, whether actually contemplated or not—simply means that compensation may be recovered for the loss of those benefits which, by a fair construction of the contract, the parties intended, or must be presumed to have intended, to confer.

Second Rule of Hadley v. Baxendale—Damages Arising from Circumstances not Contemplated.

Damages resulting from a breach of contract which were not contemplated by defendant, but arise from special circumstances unknown to him, cannot be compensated. This is the second rule of Hadley v. Baxendale, and the one which governed the decision in that case. Compensation is refused in such cases for the reason that the loss is not a natural and probable consequence of the breach. Under no circumstances can compensation be recovered for losses which do not flow naturally and probably—i. e. proximately—from the act complained of. The rule allowing compensation for losses arising from special circumstances, when such circumstances were made known to defendant, is no exception to this principle, for such losses are in fact natural consequences. The only effect of notice of special circumstances is to enlarge the domain of natural consequences,[67] and make certain consequences natural which would not be such otherwise. Only the natural and proximate consequences of the facts made known can be recovered. The stoppage of a mill is not a natural result of a failure to deliver goods, and cannot be compensated unless defendant had notice that it would result from a nondelivery.[68] Nor is loss of hire of goods a

[66] See, also, Hammond v. Bussey, 20 Q. B. Div. 79, 88.

[67] Sedg. Dam. § 157. See Thomson-Houston Electric Co. of New York v. Durant Land-Imp. Co., 144 N. Y. 34, 39 N. E. 7.

[68] Gee v. Railroad Co., 6 Hurl. & N. 211; Hadley v. Baxendale, supra. For breach of a warranty that a horse is kind, the only damages in contemplation

natural consequence of a carrier's delay in delivering them, where the carrier was not informed of the purpose for which they were shipped.[69] So, also, in the absence of notice, no consequential damages can be recovered for delay in transmitting cipher telegrams.[70] The rule that damages for breach of contract, arising from special circumstances not known to defendant cannot be recovered would seem to be almost a truism. Starting with the proposition that damages, to be recoverable in any case, must be natural and probable,—i. e. proximate,—by the very definition of "natural" and "probable," damages dependent on special and unknown circumstances are excluded.

of the parties in consequence of a breach is the diminution in value of the horse, and compensation for the breaking of plaintiff s wagon and harness in consequence of the unkindness of the horse cannot be recovered. Case v. Stevens, 137 Mass. 551. A carrier is not liable for damages for delay in the construction of a house caused by its loss of plans. Mather v. American Exp. Co., 138 Mass. 55. Damages for breach of a contract to supply boilers to be used in a pleasure boat at a summer resort are the rental value of the boat during the period of delay. Brownell v. Chapman, 84 Iowa, 504, 51 N. W. 249. Where there is a special contract to deliver apples to a connecting carrier by a certain date, made for the purpose of avoiding the danger of the apples freezing on the connecting line, damage to the apples by freezing is a natural consequence of delay. Fox v. Boston & M. R. Co., 148 Mass. 220, 19 N. E. 222. Demurrage paid to a railroad company is a natural consequence of a breach of contract to load tiles on a vessel from a train. Welch v. Anderson, 61 Law J. Q. B. 167.

[69] Hales v. Railroad Co., 4 Best & S. 66, 32 Law J. Q. B. 292; Frazer v. Smith, 60 Ill. 145. See, also, New York Academy of Music v. Hackett, 2 Hilt. 217; Morgan v. Negley, 53 Pa. St. 153; Arrowsmith v. Gordon, 3 La. Ann. 105; Brock v. Gale, 14 Fla. 523; Benziger v. Miller, 50 Ala. 206; Aldrich v. Goodell, 75 Ill. 452; Piper v. Kingsbury, 48 Vt. 480; Prosser v. Jones, 41 Iowa, 674; Halloway v. Stephens, 2 Thomp. & C. (N. Y.) 658; Fort v. Orndoff, 7 Heisk. (Tenn.) 167; Keith's Ex'r v. Hinkston, 9 Bush (Ky.) 283; Noble v. Ames Manuf'g Co., 112 Mass. 492. Where a machine is totally ruined in transportation, the carrier is liable for its whole value; but, where it had no notice that the machine was to be used by plaintiff in his business, it is not liable for the loss of the use of the machine while another was being procured to supply the place of the one destroyed. Thomas, B. & W. Manuf'g Co. v. Wabash, St. L. & P. Ry. Co., 62 Wis. 642, 22 N. W. 827.

[70] Mackay v. W. U. Tel. Co., 16 Nev. 222; Cannon v. Same, 100 N. C. 300, 6 S. E. 731; Daniel v. Same, 61 Tex. 452; Candee v. Same, 31 Wis. 471. Contra, Daughtery v. American Union Tel. Co., 75 Ala. 168. See post, p. 289.

Third Rule of Hadley v. Baxendale—Notice of Special Circumstances.

When, at the time of making a contract, notice is given of the purpose of making it, or of special circumstances affecting the quantum of damages likely to result from a breach, damages may be recovered for all the natural and probable consequences of a breach under those circumstances.[71] This is the third rule of Hadley v.

[71] In an action for breach of a contract which was made to enable plaintiff to fulfill another contract with a third person, of which purpose defendant had notice, damages for the loss on such subcontract may be recovered. Borries v. Hutchinson, 18 C. B. (N. S.) 445, 463; Elbinger Actien-Gesellschafft für Fabrication von Eisenbahn Materiel v. Armstrong, L. R. 9 Q. B. 473, 479; Hinde v. Liddell, L. R. 10 Q. B. 265; Grebert-Borgnis v. Nugent, 15 Q. B. Div. 85, 89; Messmore v. New York Shot & Lead Co., 40 N. Y. 422. Where there is notice of a subcontract, but not of the price, if the price is reasonable the profits of the subcontract may be recovered. Illinois Cent. R. Co. v. Cobb, 64 Ill. 128; Cobb v. Illinois Cent. R. Co., 38 Iowa, 601. And see Harper v. Miller, 27 Ind. 277. Otherwise not. Horne v. Midland R. Co., L. R. 7 C. P. 583; Horne v. Midland R. Co., L. R. 8 C. P. 131; Lewis v. Rountree, 79 N. C. 122. One who sells a cow to a farmer has notice that she will be placed with other cattle, and, in action for breach of warranty that she is free from foot and mouth disease, damages may be recovered for loss of other cattle to which the disease was communicated. Smith v. Green, 1 C. P. Div. 92. See, also, ante, note 26.

A defendant has notice that, in the usual course of business, goods bought by a dealer will be resold. Hammond v. Bussey, 20 Q. B. Div. 79; Thorne v. McVeagh, 75 Ill. 81. A contract may be of such a nature as to necessarily contemplate subcontracts, as, for example, building contracts, and therefore damages may be recovered arising out of such subcontracts. Smith v. Flanders, 129 Mass. 322; McHose v. Fulmer, 73 Pa. St. 365. The damage naturally resulting from the breach of an ordinary contract of sale, and therefore presumably contemplated, is the difference between the contract price and the market price, if the goods have a market price; otherwise it is the difference between the contract price and the actual value. Rhodes v. Baird, 16 Ohio St. 573. But where the purchase is made with a view to a known resale already contracted, the damages for a breach are the difference between the two contract prices. Booth v. Spuyten Duyvil Rolling-Mill Co., 60 N. Y. 487; Carpenter v. First Nat. Bank, 119 Ill. 354, 10 N. E. 18. Where there is notice of special use or need for goods. See Fletcher v. Tayleur, 17 C. B. 21; Schulze v. Great Eastern R. Co., 19 Q. B. Div. 30; Fox v. Railroad Co., 148 Mass. 220, 19 N. E. 222; Smeed v. Foord, 1 El. & El. 602; Simpson v. Railroad Co., 1 Q. B. Div. 274; Richardson v. Chynoweth, 26 Wis. 656; Hamilton v. Western N. C. R. Co., 96 N. C. 398, 3 S. E. 164; Deming v. Grand Trunk R. Co., 48 N. H. 455; Gee v. Railroad Co., 6 Hurl. & N. 211; Jones v. National Printing Co., 13

Baxendale. The reason for it is found in the fundamental principle of compensation underlying the entire law of damages. The amount of benefit which a party to a contract would derive from its performance is the measure of damages for its breach.[72] Where defendant knows that plaintiff contracts for the purpose of securing a special benefit, he must be deemed to have contracted that plaintiff should receive such benefit, and he is liable for a breach accordingly. The intention of the parties must be arrived at by interpreting the contract in the light of the surrounding circumstances known to both parties, and such circumstances form as much a part of the contract as if they were written into it. If the special circumstances were in fact written into the contract, the damages arising from a breach under those circumstances would be direct, and not consequential.[73] If a contract of sale is made to enable the vendor to secure a special benefit, and that object is known to defendant, the principle of just compensation requires him to make good its loss arising from his failure to deliver the goods.[74] In such case, the contract, interpreted in the light of the object for

Daly, 92; Vickery v. McCormick, 117 Ind. 594, 20 N. E. 495. Where there is notice of special use for premises. See Hexter v. Knox, 63 N. Y. 561; Townsend v. Nickerson Wharf Co., 117 Mass. 501; Haven v. Wakefield, 39 Ill. 509. Notice of special use of funds. Grindle v. Eastern Exp. Co., 67 Me. 317. The damages recoverable are such as ordinarily arise according to the intrinsic nature of the contract, and the surrounding facts and circumstances made known to the parties at the time of making it. Suth. Dam. § 51; Davis v. Talcott, 14 Barb. 611; Cobb v. Railroad Co., 38 Iowa, 601; Haven v. Wakefield, 39 Ill. 509; Illinois Cent. R. Co. v. Cobb, 64 Ill. 128; Winne v. Kelley, 34 Iowa, 339; Van Arsdale v. Rundel, 82 Ill. 63; Rogers v. Bemus, 69 Pa. St. 432; Hinckley v. Beckwith, 13 Wis. 34; Leonard v. New York, etc., T. Co., 41 N. Y. 544; Scott v. Rogers, 31 N. Y. 676; Hexter v. Knox, 63 N. Y. 561; True v. Telegraph Co., 60 Me. 9; Fletcher v. Tayleur, 17 C. B. 21; Squire v. Telegraph Co., 98 Mass. 232; Borradaile v. Brunton, 8 Taunt. 535; In re Trent & Humber Co., L. R. 6 Eq. 396; Dewint v. Wiltse, 9 Wend. 325; Dobbins v. Duquid, 65 Ill. 464; Shepard v. Milwaukee Gas-Light Co., 15 Wis. 318; Richardson v. Chynoweth, 26 Wis. 656; Wolcott v. Mount, 36 N. J. Law, 262; Benton v. Fay, 64 Ill. 417; Grindle v. Eastern Exp. Co., 67 Me. 317; Hamilton v. Magill, 12 L. R. Ir. 186, 204.

[72] Alder v. Keighley, 15 Mees. & W. 117.

[73] Suth. Dam. § 50; Sedg. Dam. § 160.

[74] Hammer v. Schoenfelder, 47 Wis. 455, 2 N. W. 1129. See, also, Manning v. Fitch, 138 Mass. 273; Beeman v. Banta, 118 N. Y. 538, 23 N. E. 887.

which it was made, is more than a mere contract of sale.[75] The notice cannot require the performance of any additional act to fulfill the contract, for that would be making a new and different contract, and a written contract could not be so varied by parol. A verbal notice is sufficient to enlarge the damages recoverable for the breach of a written contract.[76]

Mere knowledge will not increase the damages recoverable for a breach.[77] The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.[78] Mr. Sedgwick says [79] that the notice must form the basis of the contract, but need not form part of it, whatever that may mean. Mr. Mayne states the result of the decisions on this subject as follows:[80] "First. Where there are special circumstances connected with a contract which may cause special damage to follow if it is broken, mere notice of such special circumstances given to one party will not render him liable for the special damage, unless it can be inferred from the whole transaction that he consented to become liable for such special damage. Secondly. Where a person who has knowledge or notice of such special circumstances might refuse to enter into the contract at all, or might demand a higher remuneration for entering into it, the fact that he accepts the contract without requiring any higher rate will be evidence, though not conclusive evidence,

[75] Suth. Dam. § 50.

[76] See Hydraulic Engineering Co. v. M'Haffie, 4 Q. B. Div. 670.

[77] Sedg. Dam. § 150; Wood, Mayne, Dam. § 36; British Columbia & Vancouver's Island Spar Lumber & Saw-Mill Co. v. Nettleship, L. R. 3 C. P. 499, 37 Law J. C. P. 235.

[78] British Columbia & Vancouver's Island Spar Lumber & Saw-Mill Co. v. Nettleship, L. R. 3 C. P. 499, 37 Law J. C. P. 235; Smeed v. Foord, 1 El. & El. 602, 608; Booth v. Spuyten Duyvil Rolling-Mill Co., 60 N. Y. 487; Clark v. Moore, 3 Mich. 55, 61; Snell v. Cottingham, 72 Ill. 161; Horne v. Midland R. Co., L. R. 8 C. P. 131; Elbinger Actien-Gesellschafft für Fabrication von Eisenbahn Materiel v. Armstrong, L. R. 9 Q. B. 473, 43 Law J. Q. B. 211.

[79] Sedg. Dam. § 160, citing Cory v. Thames I. W. & S. B. Co., L. R. 3 Q. B. 181, in which the damages were held to be natural consequences, and the question of notice was therefore immaterial, and Baldwin v. United States Tel. Co., 45 N. Y. 744.

[80] Wood, Mayne, Dam. § 41.

from which it may be inferred that he has accepted the additional risk in case of breach. Thirdly. Where the defendant has no option of refusing the contract,[81] and is not at liberty to require a higher rate of remuneration, the fact that he proceeded in the contract after knowledge or notice of such special circumstances is not a fact from which an undertaking to incur a liability for special damages can be inferred."

General Result of Hadley v. Baxendale.

Hadley v. Baxendale introduced no new rule of damages.[82] It is simply a statement, in rather more specific form, of the general principle that damages, to be recoverable, must be natural and probable. To determine the natural and probable results of a breach of contract, we must first know its meaning, and we learn this by interpreting the contract in the light of all the circumstances known to the parties at its execution. Liability in cases of contract is founded on consent. One can reasonably be presumed to consent to liability only for what is at the time natural and probable under the circumstances then contemplated. Consequences that, in the usual course of things, follow the breach of similar contracts, are natural consequences; and the parties may fairly be presumed to have contemplated them, and to have consented to liability to that extent in case of breach. Where the damages arise from special circumstances, the parties cannot be presumed to have contemplated them, and to have consented to liability, unless such circumstances were made known to them. Where such circumstances are in fact made known, there is no longer any reason for treating them as special, and damages arising under such circumstances are considered natural and probable.

Motive Inducing Breach.

Since liability for a breach of contract is dependent on the circumstances known at its execution, the motive which induced the violation of the contract cannot be shown either to increase or diminish the amount of the recovery. Actions for breach of promise of marriage constitute the only exception to this rule. "It frequently happens that circumstances of fraud, malice, or violence give rise to an action of tort as an alternative remedy; but, where

[81] As in case of common carriers.

[82] Sedg. Dam. 211.

the plaintiff chooses to sue upon the contract, he lets in all the consequences of that form of action." [83] It has sometimes been held that, for breach of a contract to convey land, the vendor would be liable to higher damages if he had acted in bad faith than if he had acted innocently. The cases are conflicting, and will be considered in a later chapter.[84] In England the doctrine has been finally overruled. "The fraud may give rise to an action for deceit. But, as long as the plaintiff chooses to sue for breach of contract, he cannot, by establishing misconduct on the part of the defendant, alter the rule by which damages for breach of contract are assessed." [85]

AVOIDABLE CONSEQUENCES.

29. Compensation cannot be recovered for injuries which the injured party, by due and reasonable diligence, after notice of the wrong, could have avoided. Such consequences are regarded as remote, the injured party's will having intervened as an independent cause.

Compensation for a wrong is limited to such consequences as the injured party could not have avoided by reasonable diligence.[86] All other consequences are regarded as remote.[87] The rule is the same in cases of contract and cases of tort.[88] The injured party's own negligence or willful fault in failing to take reasonable precautions to reduce the damage, after notice of defendant's wrong, is the proxi-

[83] Wood, Mayne, Dam. § 45.

[84] Post, c. 13.

[85] Wood, Mayne, Dam. § 46.

[86] Loker v. Damon, 17 Pick. 284; Indianapolis, B. & W. Ry. Co. v. Birney, 71 Ill. 391; Salladay v. Town of Dodgeville, 85 Wis. 318, 55 N. W. 696; Brant v. Gallup, 111 Ill. 487; Grindle v. Eastern Exp. Co., 67 Me. 317; Sutherland v. Wyer, Id. 64; Simpson v. City of Keokuk, 34 Iowa, 568. Recovery for repeated entries made by defendant's cattle through an unrepaired break in plaintiff's fence should be limited to such entries as occur before plaintiff has had reasonable time to repair such break. Watkins v. Rist (Vt.) 31 Atl. 413.

[87] Laker v. Damon, 17 Pick. 284. See, also, Thompson v. Shattuck, 2 Metc. (Mass.) 615.

[88] Sutherland v. Wyer, 67 Me. 64; Sherman Center Town Co. v. Leonard, 46 Kan. 354, 26 Pac. 717.

mate cause of such injuries.[89] Courts frequently speak of the duty to make the damages as light as possible, but it is a duty only in the sense that compensation is denied for losses which might have been avoided. In Miller v. Mariner's Church[90] the doctrine was well explained. Weston, J., said: "If the party injured has it in his power to take measures by which his loss may be less aggravated, this will be expected of him. Thus, in a contract of assurance, where the assured may be entitled to recover for a total loss, he, or the master employed by him, becomes the agent of the assurer to save and turn to the best account such of the property assured as can be preserved. The purchaser of perishable goods at auction fails to complete his contract. What shall be done? Shall the auctioneer leave the goods to perish, and throw the whole loss on the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time, and, if they bring less, he may recover the difference, with commissions and other expenses of resale, from the first purchaser. If the party entitled to the benefit of a contract can protect himself from a loss arising from a breach, at a trifling expense or with reasonable exertions, he fails in social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable. 'Qui non prohibet, cum prohibere possit, jubet.' And he who has it in his power to prevent an injury to his neighbor, and does not exercise it, is often in a moral, if not in a legal, point of view, accountable for it. The law will not permit him to throw a loss resulting from a damage to himself upon another, arising from causes for which the latter may be responsible, which the party sustaining the damage might by common prudence have prevented. For example, a party contracts for a quantity of bricks to build a house, to be delivered at a given time, and engages masons and carpenters to go on with the work. The bricks are not delivered. If other bricks of an equal quality, and for the stipulated price, can be at once purchased on the spot, it would be unreasonable, by neglecting to make the purchase, to claim and receive of the delinquent party damages for the workmen and the amount of rent which might be obtained for the house if it had been built.

[89] Loker v. Damon, 17 Pick. 284.

[90] 7 Me. 51. See, also, Davis v. Fish, 1 G. Greene (Iowa) 406.

The party who is not chargeable with a violation of his contract should do the best he can in such cases; and, for any unavoidable loss occasioned by the failure of the other, he is justly entitled to a liberal and complete indemnity." Compensation for the reasonable expense and labor of an attempt to reduce the damage is chargeable to the person liable for the wrong, even though the attempt prove abortive, for the reason that, if the efforts are successful, he will have the benefit of them, and therefore, even if unsuccessful, it is but just that he should bear the expense of the attempt.[91] But the expense must be reasonable. Plaintiff need not incur unreasonable expenses, and, if he does, they cannot be recovered.[92]

The Rule Applied—Illustrations.

For breach of a contract of sale, the vendee can recover only what it would cost with reasonable diligence to procure the goods from the market or elsewhere.[93] Where goods are tendered after the time fixed for delivery, compensation for damages subsequently ac-

[91] Benson v. Malden & Melrose Gaslight Co., 6 Allen, 149; Bennett v. Lockwood, 20 Wend. 223. Where a horse is injured and rendered entirely worthless, money expended in good faith and reasonable diligence, in an effort to effect a cure, may be recovered, in addition to the value of the horse. Ellis v. Hilton, 78 Mich. 150, 43 N. W. 1048. See, also, Eastman v. Sanborn, 3 Allen (Mass.) 594. Where plaintiff incurs a new injury while reasonably endeavoring to avoid the consequences of defendant's wrong, defendant is liable for such new injuries. Jones v. Boyce, 1 Starkie, 493. Where a passenger on a stagecoach is placed in sudden danger, and, in the exercise of reasonable prudence, leaps therefrom, he may recover for injuries caused by the leap, although, had he retained his seat, he would have escaped uninjured. Ingalls v. Bills, 9 Metc. (Mass.) 1. See, also, Wilson v. Newport Dock Co., 4 Hurl. & C. 232.

[92] A passenger delayed through the fault of a railway company cannot recover the expense of a special train hired by him to reach his destination, where there was no occasion for his presence there at any particular time. Le Blanche v. Railroad Co., 1 C. P. Div. 286. Where the expense of repairing a damaged machine would have equaled the price of a new machine, the rule has no application. Thomas, B. & W. Manuf'g Co. v. Wabash, St. L. & P. Ry. Co., 62 Wis. 642, 22 N. W. 827.

[93] Parsons v. Sutton, 66 N. Y. 92; McHose v. Fulmer, 73 Pa. St. 365; Gainsford v. Carroll, 2 Barn. & C. 624; Barrow v. Arnaud, 8 Q. B. 604; Hinde v. Liddell, L. R. 10 Q. B. 265; Benton v. Fay, 64 Ill. 417; Beymer v. McBride, 37 Iowa, 114; Grand Tower Co. v. Phillips, 23 Wall. 471.

cruing cannot be recovered. One cannot refuse to take goods, and then claim damages because he could not get them.[94] A vendee need not accept goods tendered at a higher price than the contract price, nor less than the subsequent market value, as such acceptance would constitute an abandonment of the original contract.[95] The rule applies in an action against a carrier for nondelivery, where the consignee can protect himself against loss by a purchase in the market.[96]

Where an employé is wrongfully discharged before the expiration of the term of service, he must seek other employment; and the measure of damages is the difference between what he might have earned and what he should have received under his contract.[97] Reasonable diligence in seeking other employment does not require one to accept employment of an entirely different or inferior sort, or to abandon one's home and place of residence.[98] The duty to seek other employment is confined strictly to contracts for the plaintiff's time.[99] It does not apply, for instance, to a contract to build a house. The fact that the contractor has contracts to build a dozen other houses will not mitigate or lessen the damages recoverable for a breach.[100] An employé must accept re-employment tendered by the employer who has discharged him.[101] But he need not accept re-employment at a less rate, as that would be a modification of the original contract, and a bar to the recovery of any damages.[102] Where, after notice to an employé not to go on with the work, the

[94] Parsons v. Sutton, 66 N. Y. 92.

[95] Havemeyer v. Cunningham, 35 Barb. 515.

[96] Scott v. Boston & N. O. S. S. Co., 106 Mass. 468.

[97] Walworth v. Pool, 9 Ark. 394; McDaniel v. Parks, 19 Ark. 671; Sutherland v. Wyer, 67 Me. 64; Hoyt v. Wildfire, 3 Johns. 518; Shannon v. Comstock, 21 Wend. 457; Howard v. Daly, 61 N. Y. 362; Hendrickson v. Anderson, 5 Jones (N. C.) 246; King v. Steiren, 44 Pa. St. 99; Gordon v. Brewster, 7 Wis. 355.

[98] Williams v. Chicago Coal Co., 60 Ill. 149 Costigan v. Railroad Co., 2 Denio, 609; Howard v. Daly, 61 N. Y. 362; Fuchs v. Koerner, 107 N. Y. 529, 14 N. E. 445; Leatherberry v. Odell, 7 Fed. 641; Sheffield v. Page, 1 Spr. 285, Fed. Cas. No. 12,743. But see Huntington v. Railroad Co., 33 How. Prac. 416.

[99] Wolf v. Studebaker, 65 Pa. St. 459.

[100] Sedg. El. Dam. p. 77.

[101] Bigelow v. American Forcite Powder Manuf'g Co., 39 Hun, 599.

[102] Whitmarsh v. Littlefield, 46 Hun, 418.

latter, nevertheless, completes it, he cannot recover the increased damages so caused.[103]

Rule of Contributory Negligence Distinguished.

The rule of avoidable consequences must not be confounded with that of contributory negligence, though their results are somewhat similar. Contributory negligence is a complete bar to the maintenance of the action. It defeats the right to recover any damages whatever. On the other hand, the rule of avoidable consequences presupposes a valid cause of action. It has no application until a right to recover some damages at all events has arisen, and then it operates merely to reduce the amount of recovery. It cannot entirely defeat the action. Though plaintiff might have avoided the entire loss, yet, if an absolute right was invaded, he is entitled to nominal damages.[104] In cases where damages are the gist of the action, failure to avoid the damage, if it could be done by reasonable effort, would probably be regarded as contributory negligence, and a bar to the action. In actions for breach of contract, damages are never of the gist; and therefore a plea that plaintiff might have avoided all damage is no bar to the action.[105] Nominal damages, at least, are always recoverable for a breach of contract; and the doctrine of contributory negligence has no application.

Limitations of Rule.

The rule of avoidable consequences requires the injured person to exercise ordinary care to avoid injurious consequences.[106] He need not exercise more care,[107] but he cannot recover if he exercises less.[108] What is reasonable care is usually a question of fact to

[103] Clark v. Marsiglia, 1 Denio, 317.

[104] See ante, 24.

[105] Armfield v. Nash, 31 Miss. 361.

[106] Parker v. Meadows, 86 Tenn. 181, 6 S. W. 49. A party need not, in order to lessen the injury resulting from a breach of contract, employ some one else to do what the contract bound the other party to do. Gulf., C. & S. F. Ry. Co. v. Hodge (Tex. Civ. App.) 30 S. W. 829.

[107] Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409, 425, 3 N. E. 389, and 4 N. E. 908; Leonard v. Telegraph Co., 41 N. Y. 544. Where a married woman became pregnant after a personal injury, which was thereby aggravated, if she had no reason to anticipate such a consequence, she may recover therefor. Salladay v. Dodgeville, 85 Wis. 318, 55 N. W. 696.

[108] Simpson v. City of Keokuk, 34 Iowa, 568; Allender v. Railroad Co., 37

be determined in view of all the circumstances of the case.[109] No duty to avoid consequences can arise, of course, so long as the plaintiff is ignorant that a wrong has been committed.[110] Nor does the rule require impossibilities. Where, for example, plaintiffs have invested all their money in the purchase of certain corn, they cannot be required to buy other corn in the market in order to avoid a loss caused by the nondelivery of the corn purchased.[111] The rule does not require plaintiff to himself commit a wrong in order to avoid the consequences of defendant's wrong.[112] If he must violate a contract[113] or commit a trespass[114] to avoid such consequences, the rule does not apply. Neither does the rule require plaintiff to anticipate a wrong. He is entitled to rely upon the presumption that every one will do his duty, and commit no wrong. The rule only applies where a wrong or breach of contract has been actually committed.[115] For example, a passenger on a railroad

Iowa, 264. But see Green v. Mann, 11 Ill. 613; Chase v. Railroad Co., 24 Barb. 273.

[109] As to what constitutes reasonable care under the circumstances, see, for example, Bradley v. Denton, 3 Wis. 557; Poposkey v. Munkwitz, 68 Wis. 322, 32 N. W. 35; Smith v. Railroad Co., 38 Iowa, 518.

[110] Bagley v. Cleveland Rolling-Mill Co., 22 Blatchf. 342, 21 Fed. 159; Gulf, C. & S. F. Ry. Co. v. McMannewitz, 70 Tex. 73, 8 S. W. 66. "Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently and willfully and obstinately, or, through gross negligence, leaves it open all summer, and cattle get in, it is his own folly." Loker v. Damon, 17 Pick. 284.

[111] "It would be very unreasonable to require one who has bought and paid for an article to have the money in his pocket with which to buy a second in case of nondelivery of the first." Illinois Cent. R. Co. v. Cobb, 64 Ill. 128, 142. See, also, Startup v. Cortazzi, 2 Cromp. M. & R. 165; Middlekauff v. Smith, 1 Md. 329; Wilcox v. Campbell, 106 N. Y. 325, 12 N. E. 823; Id., 35 Hun. 254.

[112] Kankakee & S. R. Co. v. Horan, 23 Ill. App. 259.

[113] Leonard v. Telegraph Co., 41 N. Y. 544, 566.

[114] Chicago, R. I. & P. R. Co. v. Carey, 90 Ill. 514; Wolf v. St. Louis Independent Water Co., 15 Cal. 319; Simpson v. City of Keokuk, 34 Iowa, 568.

[115] Beers v. Board of Health, 35 La. Ann. 1132; Reynolds v. River Co., 43 Me. 513; Plummer v. Penobscot Lumbering Ass'n, 67 Me. 367. A landowner need not avoid improving his property merely because he has notice of condemnation proceedings. Driver v. Western Union R. Co., 32 Wis. 569.

train, who is without fault, cannot be required to pay his fare a second time, in order to avoid ejection.[116]

THE REQUIRED CERTAINTY OF DAMAGES.

30. Losses must be certain in amount, and certain in respect to the cause from which they proceed, or damages therefor cannot be recovered. The burden of proving both these facts is on the plaintiff.

In an action for damages, the plaintiff must prove, as a part of his case, both the amount and the cause of his loss. Absolute certainty is not required, but both the cause and the probable amount of the loss must be shown with reasonable certainty.[117] Substantial damages may be recovered though plaintiff can only state his loss proximately; but, where the evidence is so vague and uncertain that it is impossible to say that any definite amount of damage has been suffered, no damages can be recovered.[118] The cause of a loss already inflicted is shown with sufficient certainty when the loss is shown to be its natural and probable result.[119] Where the loss is pecuniary, and is present and actual, and can be measured, evidence must be given of its extent, or only nominal damages can be recovered.[120] Pain, suffering, injury to the feelings, and the like, cannot be measured by arithmetical rule; and, of necessity, the compensation for such injuries is left to the sound discretion of a jury.[121] Where compensation for actual pecuniary injury is sought, the jury have no discretion. The amount of damage must be proved, and they can award none other.[122] Where the loss is al-

[116] Yorton v. Railway Co., 62 Wis. 367, 21 N. W. 516, and 23 N. W. 401.

[117] East Tennessee, V. & G. R. Co. v. Staub, 7 Lea, 397; Wolcott v. Mount, 36 N. J. Law, 262, 271; Allison v. Chandler, 11 Mich. 542, 555.

[118] Satchwell v. Williams, 40 Conn. 371.

[119] Suth. Dam. § 53; Griffin v. Colver, 16 N. Y. 494.

[120] See ante, 24; Sedg. Dam. § 171; Leeds v. Metropolitan Gaslight Co., 90 N. Y. 26; Duke v. Missouri Pac. Ry. Co., 99 Mo. 347, 351, 12 S. W. 636.

[121] See post, p. 229.

[122] Damages for future pecuniary loss from a personal injury cannot be awarded where there is no evidence of plaintiff's condition in life, or earning power. Staal v. Grand St. & N. R. Co., 107 N. Y. 627, 13 N. E. 624.

ready inflicted, and is pecuniary, its amount may usually be proved without any uncertainty. A difficulty arises, however, where compensation is claimed for prospective losses in the nature of gains prevented; for it is impossible to prove absolutely that what might have been would have been. But absolute certainty is not required. Compensation for prospective losses may be recovered where they are such as, in the ordinary course of nature, are reasonably certain to ensue.[123] Reasonable certainty means reason-

[123] Strohm v. New York, L. E. & W. R. Co., 96 N. Y. 305. Compensation for loss of future support may be recovered in an action for death by wrongful act. Lawson v. Chicago, St. P., M. & O. Ry. Co., 64 Wis. 447, 24 N. W. 618; Eames v. Town of Brattleboro, 54 Vt. 471; Houghkirk v. Delaware & H. Canal Co., 92 N. Y. 219; Hoppe v. Chicago, M. & St. P. Ry. Co., 61 Wis. 357, 21 N. W. 227; Johnson v. Chicago & N. W. Ry. Co., 64 Wis. 425, 25 N. W. 223. Compensation may be recovered for loss of earnings or income caused by personal injuries. Moore's Adm'r v. Minerva, 17 Tex. 20; Wade v. Leroy, 20 How. 34; Pierce v. Millay, 44 Ill. 189; Chicago & A. R. Co. v. Wilson, 63 Ill. 167; City of Chicago v. Jones, 66 Ill. 349; City of Chicago v. Langlass, Id. 361; City of Chicago v. Elzeman, 71 Ill. 131; Village of Sheridan v. Hibbard, 119 Ill. 307, 9 N. E. 901; City of Joliet v. Conway, 119 Ill. 489, 10 N. E. 223; McKinley v. Chicago & N. W. R. Co., 44 Iowa, 314; Stafford v. City of Oskaloosa, 64 Iowa, 251, 20 N. W. 174; Jordan v. Middlesex R. Co., 138 Mass. 425; Stephens v. Hannibal & S. J. R. Co., 96 Mo. 207, 9 S. W. 589; Sheehan v. Edgar, 58 N. Y. 631; Pennsylvania & O. Canal Co. v. Graham, 63 Pa. St. 290; Scott Tp. v. Montgomery, 95 Pa. St. 444; Lake Shore & M. S. Ry. Co. v. Frantz, 127 Pa. St. 297, 18 Atl. 22; Houston & T. C. Ry. Co. v. Boehm, 57 Tex. 152; Goodno v. City of Oshkosh, 28 Wis. 300.

The labor of professional men has no fixed market value. What the injured person has earned in the past is evidence, though not conclusive, of what he might have earned. Pennsylvania R. Co. v. Dale, 76 Pa. St. 47; Welch v. Ware, 32 Mich. 77; New Jersey Exp. Co. v. Nichols, 33 N. J. Law, 434; Parshall v. Minneapolis & St. L. Ry. Co., 35 Fed. 649; Nash v. Sharpe, 19 Hun, 365; Walker v. Erie Ry. Co., 63 Barb. 260; Luck v. City of Ripon, 52 Wis. 196, 8 N. W. 815; Baker v. Manhattan Ry. Co., 54 N. Y. Super. Ct. 394; Phillips v. London & S. W. R. Co., 5 C. P. Div. 280; City of Indianapolis v. Gaston, 58 Ind. 224; City of Logansport v. Justice, 74 Ind. 378; Holmes v. Halde, 74 Me. 28; Metcalf v. Baker, 57 N. Y. 662; McNamara v. Village of Clintonville, 62 Wis. 207, 22 N. W. 472; Collins v. Dodge, 37 Minn. 503, 35 N. W. 368; City of Bloomington v. Chamberlain, 101 Ill. 268; Masterton v. Village of Mt. Vernon, 58 N. Y. 391. It is immaterial that plaintiff is not legally entitled to such earnings, if he was in the customary receipt of them. Phillips v. London & S. W. R. Co., 5 C. P. Div. 280; Holmes v. Halde, 74 Me. 28; Luck v. City of Ripon, 52 Wis. 196, 8 N. W. 815; McNamara v. Village of

able probability.[124] Where the losses claimed are contingent, speculative, or merely possible, they cannot be compensated.[125]

SAME—PROFITS OR GAINS PREVENTED.

31. Compensation may be recovered for profits lost when the loss is a proximate and certain result of the tort or breach of contract.

It was at one time laid down as a general rule that damages could not be recovered for the loss of profits.[126] It was thought that profits were in their very nature too uncertain to be considered.[127] It is well established now, however, that damages may be recovered for such losses if they are proximate, and certain. Selden, J., said:[128] "It is a well-established rule of the common law that dam-

Clintonville, 62 Wis. 207, 22 N. W. 472. But loss of earnings in an illegal employment cannot be compensated. Jacques v. Bridgeport Horse R. Co., 41 Conn. 61; Kauffman v. Babcock, 67 Tex. 241, 2 S. W. 878. Where one is learning a profession, compensation may be recovered on the basis of the probable skill he would have acquired. Howard Oil Co. v. Davis, 76 Tex. 630, 13 S. W. 665. Where one is not engaged in business at the time of an injury, he may recover compensation for being prevented from engaging in business in the future. Fisher v. Jansen, 128 Ill. 549, 21 N. E. 598. Prospective damages for defamation cannot be recovered, as the verdict heals the reputation. Halstead v. Nelson, 24 Hun, 395; Bradley v. Cramer, 66 Wis. 297, 28 N. W. 372.

[124] Griswold v. New York Cent. & H. R. Co., 115 N. Y. 61, 21 N. E. 726; Feeney v. Long Island R. Co., 116 N. Y. 375, 22 N. E. 402.

[125] De Costa v. Massachusetts Flat Water & Mining Co., 17 Cal. 613; Fry v. Dubuque & S. W. Ry. Co., 45 Iowa, 416; Lincoln v. Saratoga & S. R. Co., 23 Wend. 425; Staal v. Grand St. & N. R. Co., 107 N. Y. 625, 13 N. E. 624; Chicago City Ry. Co. v. Henry, 62 Ill. 142.

[126] Mr. Sedgwick calls attention to the confusion arising from the loose use of the word "profits." As used by the courts in this connection, it may mean either the wages a man could earn, the rent or value of use of property, the advantages of a contract, or the true profits of a business. Care must be taken to ascertain in which sense it is used in particular cases. Sedg. Dam. 250.

[127] See The Lively, 1 Gall. 315, 325, Fed. Cas. No. 8,403; The Anna Maria, 2 Wheat. 327; The Amiable Nancy, 3 Wheat. 546; La Amistad de Rues, 5 Wheat. 385; Boyd v. Brown, 17 Pick. 453; Smith v. Condry, 1 How. (U. S.) 28; Minor v. The Picayune No. 2, 13 La. Ann. 564.

[128] Griffin v. Colver, 16 N. Y. 489, 491. See, also, Brigham v. Carlisle, 78

ages recoverable for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should per se prevent their allowance. Profits which would certainly have been realized but for the defendant's fault are recoverable; those which are speculative and contingent are not. The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract,—that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." Thus, anticipated profits from the use of money cannot be recovered in an action for its nonpayment, because, non constat, instead of realizing any profits, a loss might have been sustained, owing to unforeseen circumstances, as often happens in the business world. In such cases, the average value of the use of money—i. e. interest—is the only loss that can be certainly proved, and is therefore the measure of damages.[129]

The Rule Applied—Illustrations.

Where plaintiff is engaged in a mercantile business, compensation for a personal injury is limited to the value of his loss of time. Loss of profits of the business through the injury to the good will

Ala. 243, 249; Masterton v. Mayor, etc., of Brooklyn, 7 Hill. 61; Sherman Center Town Co. v. Leonard, 46 Kan. 354, 26 Pac. 717. Expected specific profits cannot be recovered. Brown v. Smith, 12 Cush. 366; Aber v. Bratton, 60 Mich. 357, 27 N. W. 564; Callaway Min. & Manuf'g Co. v. Clark, 32 Mo. 305; Marlow v. Lajeunesse, 18 L. C. Jur. 188. Anticipated profits from a competition or speculation are too uncertain to be compensated. Watson v. Ambergate, N. & B. R. Co., 15 Jur. 448; Western Union Tel. Co. v. Crall, 39 Kan. 580, 18 Pac. 719; Mizner v. Frazier, 40 Mich. 592; W. U. Tel. Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577. But see Adams Exp. Co. v. Egbert, 36 Pa. St. 360. Damages assessed on the basis of an approximate estimate of the maturity of building association stock are not speculative. Manter v. Truesdale, 57 Mo. App. 435.

[129] Greene v. Goddard, 9 Metc. (Mass.) 212, 232. See post, 144, "Interest."

is not a natural consequence.[130] The usual and ordinary profits of an established business are reasonably certain, and may be recovered in an action for interruption of the business, in the absence of anything showing that they would not have been realized.[131] Some businesses are of so uncertain a nature that their profits never become established, such as fishing.[132] Plaintiff cannot recover anticipated profits of a new business, in which he was wrongfully prevented from embarking.[133] Only the amount paid for the publication of an advertisement in a newspaper can be recovered for its negligent omission.[134] Damages for the loss of use of land or business premises are the rental value.[135] But, where such loss interrupts an established business, loss of profits may also be compensated.[136] The measure of damages for the nondelivery of or injury to machinery is the value of its use;[137] but expected profits

[130] Marks v. Long Island R. Co., 14 Daly, 61; Bierbach v. Rubber Co., 54 Wis. 208, 11 N. W. 514; Masterton v. Village of Mt. Vernon, 58 N. Y. 391.

[131] Allison v. Chandler, 11 Mich. 542; Peltz v. Eichele, 62 Mo. 171; Gunter v. Astor, 4 Moore, 12; Willer v. Navigation Co., 15 Or. 153, 13 Pac. 768; French v. Lumber Co., 145 Mass. 261, 14 N. E. 113.

[132] Wright v. Mulvaney, 78 Wis. 89, 46 N. W. 1045; Willis v. Branch, 94 N. C. 142; Hunt v. Improvement Co., 3 E. D. Smith, 144; Jones v. Call, 96 N. C. 337, 2 S. E. 647.

[133] Red v. City Council of Augusta, 25 Ga. 386; Kenny v. Collier, 79 Ga. 743, 8 S. E. 58; Greene v. Williams, 45 Ill. 206; Hair v. Barnes, 26 Ill. App. 580; Morey v. Gaslight Co., 38 N. Y. Super. Ct. 185; Bingham v. Walla Walla, 3 Wash. T. 68, 13 Pac. 408; Aber v. Bratton, 60 Mich. 357, 27 N. W. 564.

[134] Eisenlohr v. Swain, 35 Pa. 107.

[135] City of Chicago v. Huenerbein, 85 Ill. 594; Newark Coal Co. v. Upson, 40 Ohio St. 17; Snodgrass v. Reynolds, 79 Ala. 452; Rose v. Wynn, 42 Ark. 257; Robrecht v. Marling's Adm'r, 29 W. Va. 765, 2 S. E. 827; Hexter v. Knox, 63 N. Y. 561; Townsend v. Nickerson Wharf Co., 117 Mass. 501; Giles v. O'Toole, 4 Barb. 261; Fondavila v. Jourgensen, 52 N. Y. Super. Ct. 403; Skinker v. Kidder, 123 Ind. 528, 24 N. E. 341; Dodds v. Hakes, 114 N. Y. 260, 21 N. E. 398; City of Cincinnati v. Evans, 5 Ohio St. 594.

[136] See supra, and also Ward v. Smith, 11 Price, 19; Hexter v. Knox, 63 N. Y. 561; Poposkey v. Munkwitz, 68 Wis. 322, 32 N. W. 35; Shaw v. Hoffman, 25 Mich. 163; Seyfert v. Bean, 83 Pa. St. 450; Llewellyn v. Rutherford, L. R. 10 C. P. 456; Sewall's Falls Bridge v. Fisk, 23 N. H. 171; Schile v. Brokhahus, 80 N. Y. 614; Gibson v. Fischer, 68 Iowa, 29, 25 N. W. 914; Woodin v. Wentworth, 57 Mich. 278, 23 N. W. 813; Pollitt v. Long, 58 Barb. 20.

[137] Blanchard v. Ely, 21 Wend. 342; Griffin v. Colver, 16 N. Y. 489, 496. See, also, Satchwell v. Williams, 40 Conn. 371; Strawn v. Cogswell, 28 Ill.

from its use are too uncertain to be recovered.[138] Loss of profits by the destruction of an unmatured crop is usually regarded as too uncertain to be compensated;[139] but compensation based on the average crop of that year has been allowed.[140] Loss of profits of the crop which may grow cannot be recovered for breach of warranty of the seeds.[141] Where an inferior crop is raised, the damages recoverable are the difference between its value and that of the same crop of the kind warranted.[142] For breach of a contract of partnership, plaintiff may recover such profits as he can prove with reasonable certainty. Evidence of past profits is admissible, but not conclusive.[143] Where the partnership was terminable on notice, future profits cannot be recovered.[144] Profits of collateral transactions are usually too remote and uncertain to be recovered

457; Benton v. Fay, 64 Ill. 417; Cassidy v. Le Fevre, 45 N. Y. 562; Pittsburg Coal Co. v. Foster, 59 Pa. St. 365; Pettee v. Manufacturing Co., 1 Sneed, 381; Hinckley v. Beckwith, 13 Wis. 31; Priestly v. Railroad Co., 26 Ill. 205; Middlekauff v. Smith, 1 Md. 329.

138 Willingham v. Hooven, 74 Ga. 233; McKinnon v. McEwan, 48 Mich. 106, 11 N. W. 828; Alls v. McLean, 48 Mich. 428, 12 N. W. 640; Krom v. Levy, 48 N. Y. 679; Davis v. Railroad Co., 1 Disney, 23; Pennypacker v. Jones, 106 Pa. St. 237; Rogers v. Bemus, 69 Pa. St. 432; Bridges v. Lanham, 14 Neb. 369, 15 N. W. 704.

139 Gresham v. Taylor, 51 Ala. 505; Richardson v. Northrup, 66 Barb. 85; Roberts v. Cole, 82 N. C. 292; Texas & St. L. R. Co. v. Young, 60 Tex. 201; McDaniel v. Crabtree, 21 Ark. 431; Sledge v. Reid, 73 N. C. 440; Jones v. George, 56 Tex. 149.

140 Payne v. Morgan's L. & T. R. & S. S. Co., 38 La. Ann. 164; Rice v. Whitmore, 74 Cal. 619, 16 Pac. 501.

141 Butler v. Moore, 68 Ga. 780; Ferris v. Comstock, Ferre & Co., 33 Conn. 513.

142 Schutt v. Baker, 9 Hun, 556; Randall v. Raper, El., Bl. & El. 84; Wolcott v. Mount, 36 N. J. Law, 262; Passinger v. Thorburn, 34 N. Y. 634; White v. Miller, 7 Hun, 427, 71 N. Y. 118; Flick v. Wetherbee, 20 Wis. 392. See Van Wyck v. Allen, 69 N. Y. 61. Contra, Hurley v. Buehl, 10 Lea, 346.

143 Bagley v. Smith, 10 N. Y. 489; M'Neill v. Reid, 9 Bing. 68; Gale v. Leckie, 2 Starkie, 107; Dart v. Laimbeer, 107 N. Y. 664, 14 N. E. 291; Reiter v. Morton, 96 Pa. St. 229; Dennis v. Maxfield, 10 Allen 138; Wakeman v. Manufacturing Co., 101 N. Y. 205, 4 N. E. 264; Winslow v. Lane, 63 Me. 161; Barnard v. Poor, 21 Pick. 378.

144 Skinner v. Tinker, 34 Barb. 333; Ball v. Britton, 58 Tex. 57.

for breach of contract;[145] but, where the profit is the thing contracted for, it may be recovered.[146]

The average or usual value of the use of personal property is the measure of damages for the loss of its use.[147] For the loss of personal property, the wholesale market value, and not the retail value, is the measure of damages.[148] "The retail value or the price at which goods are sold at retail includes the expected and contingent profits, the earning of which involves labor, loss of time, and expenses, supposes no damage to or depreciation in the value of the goods, and is dependent upon the contingency of finding purchasers for cash, and not upon credit, within a reasonable time, the sale of the entire stock without the loss by unsalable remnants, and the closing out of a stock of goods as none ever was or ever will be closed out, by sales at retail, at full prices." [149]

Prospective Gains from Property Totally Destroyed.

Anticipated profits or gains from the use of property which has been totally destroyed by defendant's wrong do not fall within the rule, and cannot be recovered. In such cases compensation is given for the whole value of the property destroyed, and thereupon, in legal contemplation, all plaintiff's title and interest in the property ceases. It is as though he had sold it. Having received full value, and parted with his title to the property, plaintiff cannot justly

[145] Fox v. Harding, 7 Cush. 516; Smith v. Flanders, 129 Mass. 322; Mace v. Ramsey, 74 N. C. 11; Mitchell v. Cornell, 44 N. Y. Super. Ct. 401; Houston & T. C. R. Co. v. Hill, 63 Tex. 381; Evans v. Railroad Co., 78 Ala. 341; Missouri, K. & T. R. Co. v. City of Ft. Scott, 15 Kan. 435; Shaw v. Hoffman, 25 Mich. 162; Watterson v. Allegheny Val. R. Co., 74 Pa. St. 208; Frye v. Maine Cent. R. Co., 67 Me. 414.

[146] Masterton v. Mayor, etc., 7 Hill, 61; Lentz v. Choteau, 42 Pa. St. 435.

[147] Benton v. Fay, 64 Ill. 417; Shelbyville L. B. R. Co. v. Lewark, 4 Ind. 471; Monroe v. Lattin, 25 Kan. 351; Brown v. Hadley, 43 Kan. 267, 23 Pac. 492; Johnson v. Inhabitants of Holyoke, 105 Mass. 80; Luce v. Hoisington, 56 Vt. 436; Wright v. Mulvaney, 78 Wis. 89, 46 N. W. 1045; Cushing v. Seymour, Sabin & Co., 30 Minn. 301, 15 N.W. 249; Fultz v. Wycoff, 25 Ind. 321; Whitson v. Gray, 3 Head, 441; Brown v. Foster, 51 Pa. St. 165; Bohn v. Cleaver, 25 La. Ann. 419.

[148] Young v. Cureton, 87 Ala. 727, 6 South. 352.

[149] Wehle v. Haviland, 69 N. Y. 448. But see Alabama Iron Works v. Hurley, 86 Ala. 217, 5 South. 418.

claim compensation for gains he might have derived from its future use.[150]

ENTIRETY OF DEMAND.

32. All the damage resulting from a single cause of action must be recovered in a single action. The demand cannot be split, and separate actions maintained for the separate items of damage.

A single cause of action gives rise to but a single demand for damages. It is an entirety. Plaintiff must demand the full amount of damages to which he is entitled in one suit, and a judgment therein is a bar to any subsequent suit on the same cause of action, even though losses arise subsequently which could not have been foreseen or proved at the time of the former suit. The matters complained of have become res judicata. The cause of action cannot be split, and separate suits maintained for the recovery of each separate item of damage. A cause of action is the wrong complained of; that is, the conjunction of conduct and damage.[151] Neither alone constitutes a legal wrong. When an award of damages has been once made for a wrong, that wrong is redressed. Losses subsequently arising, without a renewal or continuance of the conduct, are damnum absque injuria.[152] On this principle, a recovery in an action for assault and battery was held to be a bar to a subsequent action for additional damages, brought upon the falling out of another piece of plaintiff's skull.[153] Holt, C. J., said: "Every new dropping is a nuisance, but it is not a new battery; and, in trespass, the grievousness or consequence of the battery is not the ground of the action, but the measure of damages which the jury must be supposed to have considered at the trial." And in another place he

[150] Sedg. Dam. § 178; McKnight v. Ratcliff, 44 Pa. St. 156; Erie City Iron Works v. Barber, 106 Pa. St. 125; Thomas B. & W. Manuf'g Co. v. Wabash, St. L. & P. Ry. Co., 62 Wis. 642, 22 N. W. 827; Edwards v. Beebe, 48 Barb. 106.

[151] See ante, p. 7 et seq.

[152] Wichita & W. R. Co. v. Beebe, 39 Kan. 465, 18 Pac. 502; Howell v. Goodrich, 69 Ill. 556; Pierro v. Railway Co., 39 Minn. 451, 40 N. W. 520; Winslow v. Stokes, 3 Jones (N. C.) 285.

[153] Fetter v. Beal, 1 Ld. Raym. 339, 692, 1 Salk. 11.

said: "If this matter had been given in evidence as that which in probability might have been the consequence of the battery, the plaintiff would have recovered damages for it. The injury, which is the foundation of the action, is the battery, and the greatness or consequence of that is only in aggravation of damages."

TIME TO WHICH COMPENSATION MAY BE RECOVERED—PAST AND FUTURE LOSSES.

33. The damages recoverable in an action include compensation not only for losses already sustained at the time of beginning the action, but also for losses which have arisen subsequently, and for prospective losses, if such losses are the certain and proximate results of the cause of action, and do not themselves constitute a new cause of action.

Repetition of Wrong.

Where an action has been brought for a wrong, and the wrong is subsequently repeated, a new action must be brought to recover the damages caused thereby. Such repetition constitutes a new cause of action, and compensation for the losses caused by one wrong cannot be recovered in an action brought to recover the damages caused by another and a distinct wrong.[154]

Continuing Torts and Breaches of Contract.

A single wrongful act, however, may be of such a nature as to give rise to a continuous succession of torts or breaches of contracts. "In the case of a personal injury the act complained of is complete and ended before the date of the writ. It is the damage only that continues and is recoverable, because it is traced back to the act; while in the case of a nuisance it is the act which continues, or, rather, is renewed day by day. The duty which rests upon a wrongdoer to remove a nuisance causes a new trespass for each day's neglect."[155] In this class of cases, therefore, successive actions may

[154] In an action for slander, evidence of words spoken after commencement of suit are inadmissible. Root v. Lowndes, 6 Hill, 518; Keenholts v. Becker, 3 Denio, 346.

[155] Rockland Water Co. v. Tillson, 69 Me. 255, 268. An excavation on one's

be maintained to recover compensation for the successive losses sustained, because each loss results from a separate cause of action.[156] For the same reason, the damages in each case are limited to compensation for losses already sustained at the time of bringing the action. Damages for prospective losses cannot be recovered, for they constitute the basis of new actions. A continuing tort or breach of contract is, in effect, simply the repetition of the same wrong an infinite number of times. For instance, where defendant covenanted to keep a gate in repair, each moment it was suffered to remain out of repair constituted a separate breach of the covenant, for which a separate action would lie. Therefore the damages recoverable in an action for the breach of such a covenant are limited to compensation for losses already suffered at the time of commencing suit.[157] As a general rule, where a continuous duty is imposed by contract, each moment its performance is neglected constitutes a separate breach, for which an action will lie. This has been held in actions for the breach of contracts for support,[158] contracts not to engage in business,[159] and contracts to convey land.[160]

Any breach of an entire contract may be treated as a total breach,[161] and often the neglect of a continuing duty imposed by contract may be so considered.[162] Where such is the case, the en-

own land is not a tort; but causing the subsidence of a neighbor's land by such excavation is a tort. Therefore successive actions may be maintained for successive subsidences. Darley Main Colliery Co. v. Mitchell, 11 App. Cas. 127.

156 Rockland Water Co. v. Tillson, 69 Me. 255, 268.

157 Beach v. Crain, 2 N. Y. 86.

158 Fay v. Guynon, 131 Mass. 31.

159 Hunt v. Tibbetts, 70 Me. 221.

160 Warner v. Bacon, 8 Gray, 397.

161 "Whether a contract be single and entire or apportionable, if there is a total abandonment or breach by one party, the other has a single cause of action upon the entire contract if he think proper to act on the breach as a total one; and the better opinion is that he is obliged to do so. A party has a right to break his contract on condition of being liable for the damages which will accrue therefrom at the time he elects to do so." Suth. Dam. 225. See, also, Fish v. Folley, 6 Hill, 54.

162 Suth. Dam. 256; Grand Rapids & B. C. R. Co. v. Van Deusen, 29 Mich. 431; Town of Royalton v. Royalton & W. Turnpike Co., 14 Vt. 311; Withers v. Reynolds, 2 Barn. & Adol. 882; Fish v. Folley, 6 Hill, 54; Crain v. Beach,

tire damage, both past and prospective, may be recovered in a single action, and the judgment is a bar to any subsequent action. The breach of a contract to support plaintiff for life has sometimes been regarded as a total breach, and plaintiff allowed to recover the entire value of the promised support in one action;[163] but, as the contract imposes a continuous duty, any breach may be regarded as a partial one only, and successive actions may be maintained.[164] Whether an act is a total or only a partial breach is rather a question of the law of contracts than of damages. In doubtful cases it should be left to the jury.[165]

Illustrations.

Illustrations of continuing torts are numerous. In an action for false imprisonment, damages cannot be given for a continuance of the imprisonment after the commencement of the action, for every instant of detention without just cause is an independent tort.[166] So, also, a nuisance gives rise to a fresh cause of action every moment it is maintained; and therefore the damages recoverable are limited to those already suffered at the commencement of the suit.[167]

2 Barb. 124; Beach v. Crain, 2 N. Y. 86; Keck v. Bieber, 148 Pa. St. 645, 24 Atl. 170. See, also, Badger v. Titcomb, 15 Pick. 409. In Cooke v. England, 27 Md. 14, it was held that both past and prospective damages could be recovered for breach of a contract to repair machinery in a mill, for the contract could not be kept alive. But, for breach of a contract to keep cattle passes in repair, prospective damages cannot be recovered. Phelps v. New Haven & N. Co., 43 Conn. 453.

[163] Covenants for support and maintenance during life are entire, and any breach entitles the injured party to recover entire damages as for a total breach. Schell v. Plumb, 55 N. Y. 592; Dresser v. Dresser, 35 Barb. 573; Shaffer v. Lee, 8 Barb. 412; Trustees of Howard College v. Turner, 71 Ala. 429; Wright v. Wright, 49 Mich. 624, 14 N. W. 571; Parker v. Russell, 133 Mass. 74.

[164] Suth. Dam. 256; Fiske v. Fiske, 20 Pick. 499; Berry v. Harris, 43 N. H. 376; Ferguson v. Ferguson, 2 N. Y. 360; Turner v. Hadden, 62 Barb. 480.

[165] Sedg. Dam. 125; Shaffer v. Lee, 8 Barb. 412; Remelee v. Hall, 31 Vt. 582.

[166] Brasfield v. Lee, 1 Ld. Raym. 329; Withers v. Henley, Cro. Jac. 379.

[167] Denver City Irrigation & Water Co. v. Middaugh, 12 Colo. 434, 21 Pac. 565; Duncan v. Markley, 1 Harp. 276; Cobb v. Smith, 38 Wis. 21; Stadler v. Grieben, 61 Wis. 500, 21 N. W. 629. See, also, Pearson v. Carr, 97 N. C. 194, 1 S. E. 916; Dailey v. Canal Co., 2 Ired. 222. In an action for flowing land, damages can be recovered only for losses suffered prior to bringing suit Polly v. McCall, 37 Ala. 20; Benson v. Railroad Co., 78 Mo. 504; Nashville

The reason and necessity of permitting successive actions in this class of cases is very clear. It is one's duty to discontinue a trespass or remove a nuisance.[168] The law cannot presume that defendant will continue the wrong, nor will it permit him to acquire a right to continue it, by permitting a recovery therefor in advance.[169] Thus, where the wrong consists in the unlawful maintenance of a private structure, or an unlawful use of land, the wrong cannot be presumed to be permanent; and therefore prospective damages cannot be recovered. This principle has been applied in actions for obstructing a stream,[170] for obstructing ancient lights,[171] for filling a canal,[172] and for laying out a highway around plaintiff's toll gate.[173]

Where an injury to plaintiff's land consists of a trespass which defendant cannot remedy without committing another trespass, the wrong is not regarded as a continuing one, and damages for the entire loss must be recovered in one action. Making an excavation [174]

v. Comar, 88 Tenn. 415, 12 S. W. 1027; Hargreaves v. Kimberly, 26 W. Va. 787. So, also, in actions for diverting water courses, Langford v. Owsley, 2 Bibb, 215; Dority v. Dunning, 78 Me. 387, 6 Atl. 6; Shaw v. Etheridge, 3 Jones (N. C.) 300; or for polluting it, Sanderson v. Coal Co., 102 Pa. St. 370.

[168] There is a legal obligation to discontinue a trespass or remove a nuisance. Clegg v. Dearden, 12 Q. B. 601; Savannah, F. & W. R. Co. v. Davis, 25 Fla. 917, 7 South. 29; Adams v. Railroad Co., 18 Minn. 260 (Gil. 236); Barrick v. Schifferdecker, 48 Hun, 355, 1 N. Y. Supp. 21; Cumberland & O. C. Corp. v. Hitchings, 65 Me. 140.

[169] Suth. Dam. 255; Adams v. Railroad Co., 18 Minn. 260 (Gil. 236); Ford v. Railroad Co., 14 Wis. 663; Uline v. Railroad Co., 101 N. Y. 98, 4 N. E. 536; Savannah & O. C. Co. v. Bourquin, 51 Ga. 378; Hanover Water Co. v. Ashland Iron Co., 84 Pa. St. 279; Whitmore v. Bischoff, 5 Hun, 176; Sherman v. Railroad Co., 40 Wis. 645; Russell v. Brown, 63 Me. 203; Bowyer v. Cook, 4 C. B. 236; Cumberland & O. C. Corp. v. Hitchings, 65 Me. 140.

[170] Damages can be recovered for the unauthorized obstruction of a stream by a dam only up to the commencement of suit. Langford v. Owsley, 2 Bibb, 215; Williams v. Water Co., 79 Me. 543, 11 Atl. 600; Van Hoozier v. Railroad Co., 70 Mo. 145; Thayer v. Brooks, 17 Ohio, 489; Bare v. Hoffman, 79 Pa. St. 71.

[171] Blunt v. McCormick, 3 Denio, 283. See, also, Union Trust Co. v. Cuppy, 26 Kan. 754; Spilman v. Navigation Co., 74 N. C. 675; Winchester v. Stevens Point, 58 Wis. 350, 17 N. W. 547; Moore v. Hall, 3 Q. B. Div. 178.

[172] Cumberland & O. C. Corp. v. Hitchings, 65 Me. 140.

[173] Cheshire Turnpike v. Stevens, 13 N. H. 28.

[174] Kansas P. Ry. Co. v. Mihlman, 17 Kan. 224; Clegg v. Dearden, 12 Q. B. 576.

or embankment[175] on plaintiff's land, or filling up his pond,[176] are instances where this rule has been properly applied.[177] In these cases there is continuing damage, but no continuing conduct. The trespass—the wrong—was completed once for all.

Damage Caused by Permanent Structures.

Where permanent structures have been erected which result in injury to land, there is much confusion and conflict in the authorities as to whether all the damages, past and prospective, may be recovered in a single suit, or whether successive actions must be brought to recover compensation for the damage as it arises. The confusion is largely due to a lack of clear conception as to the fundamental nature of legal rights. The terms "legal" and "illegal," "rightful" and "wrongful," have not been used with precision; and, as a consequence, precedents have been misapplied. It is impossible to reconcile all the cases. One line of decision holds that where permanent structures are erected, resulting in injury to lands, all damages may be recovered in a single suit. Thus, it was said in an Iowa case:[178] "Where a nuisance is of such a character that its continuance is necessarily an injury, and when it is of a permanent character, that will continue without change from any cause but human labor, the damage is original, and may be at once fully estimated and compensated." So, it has been held that compensation for the entire loss, both past and prospective, caused by a railroad embankment, must be recovered in one suit.[180] But even in such cases the ordinary rule has been applied in some states, and damages are recoverable only to the commencement of the action.[181]

[175] Ziebarth v. Nye, 42 Minn. 541, 44 N. W. 1027.

[176] Finley v. Hershey, 41 Iowa, 389.

[177] Where defendant flooded plaintiff's mine by breaking through into it, the entire damage must be recovered in one action. National Copper Co. v. Minnesota Min. Co., 57 Mich. 83, 23 N. W. 781; Lord v. Manufacturing Co., 42 N. J. Eq. 157, 6 Atl. 812.

[179] Stodghill v. Railroad Co., 53 Iowa, 341, 5 N. W. 495. See, also, Van Orsdol v. Railroad Co., 56 Iowa, 470, 9 N. W. 379.

[180] Indiana, B. & W. R. Co. v. Eberle, 110 Ind. 542, 11 N. E. 467; Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 18 N. E. 460. See, also, Fowle v. New Haven & Northampton Co., 112 Mass. 334; Town of Troy v. Cheshire R. Co., 23 N. H. 83; Adams v. Railroad Co., 18 Minn. 260 (Gil. 236).

[181] Uline v. Railroad Co., 101 N. Y. 98, 4 N. E. 536; Durrea v. Mayor, etc.,

Reverting to first principles for a moment, the whole matter becomes clear. If the structure is expressly authorized, there is no liability for the damage necessarily resulting. If it is authorized on condition that compensation be made for the resulting damage (a condition commonly imposed by the authorizing act or the constitution), and it is permanent in its nature, its continuance may reasonably be presumed, and full compensation for both past and prospective losses may be recovered in one action.[182] It is on this principle that the railroad embankment case, supra, and other like cases, are to be sustained. Of course, if an authorized permanent work is done negligently, and the negligence results in a continuing injury, it cannot be presumed that the negligence will continue, but, rather, that it will be remedied; and compensation can therefore be recovered only to the commencement of the action, and subsequent actions must be brought for damages subsequently accruing.[183]

Where the erection of the structure was a forbidden act, that is, where it was a trespass, and the act of trespass is completed once for all, the entire damage, past and prospective, must be recovered in one suit.* Continuing damage does not make a continuing tres-

26 Hun, 120; Blunt v. McCormick, 3 Denio, 283; Cooke v. England, 27 Md. 14, 92 Am. Dec. 630, and notes; Reed v. State, 108 N. Y. 407, 15 N. E. 735; Hargreaves v. Kimberly, 26 W. Va. 787; Ottenot v. Railroad Co., 119 N. Y. 603, 23 N. E. 169; Barrick v. Schifferdecker, 123 N. Y. 52, 25 N. E. 365; Aldworth v. City of Lynn, 153 Mass. 53, 26 N. E. 229; Town of Troy v. Cheshire R. Co., 23 N. H. 83; Cobb v. Smith, 38 Wis. 21; Delaware & R. Canal Co. v. Wright, 21 N. J. Law, 469; Wells v. New Haven & Northampton Co., 151 Mass. 46, 23 N. E. 724; Cooper v. Randall, 59 Ill. 317; Joseph Schlitz Brewing Co. v. Compton, 142 Ill. 511, 32 N. E. 693.

[182] Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 8 N. E. 460; Jeffersonville, M. & I. R. Co. v. Esterle, 13 Bush, 667. But see Uline v. Railroad Co., 101 N. Y. 98, 4 N. E. 536; Pond v. Railroad Co., 112 N. Y. 186, 19 N. E. 487, and cases cited in preceding note. Cf. Cadle v. Railroad Co., 44 Iowa, 11.

[183] Aldworth v. City of Lynn, 153 Mass. 53, 26 N. E. 229; City of Eufaula v. Simmons, 86 Ala. 515, 6 South. 47; Reed v. State, 108 N. Y. 407, 15 N. E. 735; Duryea v. Mayor, etc., 26 Hun, 120. See, also, City of North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821. Powers v. City of Council Bluffs, 45 Iowa, 652, relied on in Stodghill v. Railroad Co., 53 Iowa, 341, 5 N. W. 495, cannot be sustained. In this case the construction of the ditch by the city was an authorized act, but it was done negligently.

* See Adams v. Railroad Co., 18 Minn. 260 (Gil. 236).

pass. There must be continuing conduct as well. Thus, where a trespasser digs a ditch on another's land, and leaves it, the continued existence of the ditch does not make the wrong a continuing trespass.[184] It constitutes merely a continuing damage. The trespass was complete when the trespasser left the premises. Consequently, the entire damages, past and prospective, must be recovered in one action. The trespasser is not guilty of continuing a trespass or maintaining a nuisance because he is under no duty to remedy it. He could not do so without committing a new trespass.

It is sometimes stated that "if a man throws a heap of stones or builds a wall or plants posts or rails on his neighbor's land, and there leaves them, an action will lie against him for the trespass, and the right to sue will continue from day to day until the incumbrance is removed."[185] This is essentially not true. The wrongful conduct was complete when the stones or wall were placed on the other's land and the trespasser had departed. He could not then remove them without committing a new trespass. The tort is completed, but the damage is continuing. The law is not so absurd as to hold one liable for continuing what it forbids him to discontinue. But where the trespasser remains in possession and control, or maintains or uses the structure erected by him, then we have a continuing trespass, because there is continuing conduct. Successive actions may therefore be maintained from day to day so long as such trespass is continued. Thus, railroad companies which, by trespass, had entered upon the lands of individuals, and begun the construction and operation of railroads, were held liable as trespassers from day to day so long as the operation of the road was continued.[186] Staying and continuing in a house is a divisible tres-

[184] Kansas Pac. Ry. Co. v. Mihlman, 17 Kan. 224.

[185] 1 Add. Torts, 332. See, also, Russell v. Brown, 63 Me. 203. In National Copper Co. v. Minnesota Min. Co., 57 Mich. 83, 23 N. W. 781, Cooley, J., draws a distinction between leaving a hole on another's premises, and leaving houses or other obstructions there; saying that physical hindrances are a continuance of the original force, and therefore are continuing trespasses, but that a hole is only the consequence of a wrongful force which ceased to operate the moment it was made. The distinction is unsound. See Kansas Pac. Ry. Co. v. Mihlman, 17 Kan. 224, 233, per Brewer, J.

[186] Adams v. Railroad Co., 18 Minn. 260 (Gil. 236); Town of Troy v. Cheshire R. Co., 23 N. H. 83.

pass in point of time. There is a fresh trespass on each day.[187] Judge Cooley pronounced the principle of these decisions not open to criticism. "In each of them there was an original wrong, but there was also a persistency in the wrong from day to day. The plaintiff's possession was continually invaded, and his right to the exclusive occupation and enjoyment of his freehold continually encroached upon and limited. Each day, therefore, the plaintiff suffered a new wrong, but no single suit could be made to embrace prospective damages, for the reason that future persistency in the wrong could not legally be assumed." [188]

Where the erection of the structure was neither authorized nor forbidden, but it is wrongful, because it results in injury to plaintiff's land,—that is, where it is a nuisance,—though the structure is permanent in its nature, and "will continue without change from any cause but human labor," and its continuance may be presumed, the damages cannot be estimated beyond the date of bringing the action, because, in the case of an ordinary nuisance, the cause of action is not so much the act of the defendant as the damage resulting from his act, and hence the cause of action does not arise until such consequences occur.[189] Thus, it was held in an action by a tenant against his landlord to recover damages because of the latter's erection of buildings adjoining the demised premises, which shut out

[187] Per Parke, B., in Loweth v. Smith, 12 Mees. & W. 582. Where a turnpike company had placed buttresses on the plaintiff's land for the support of its road, it was held that a recovery of damages for the trespass did not bar a subsequent action for the continuance of the buttresses. "The continued use of the buttresses for the support of the road, under such circumstances, was a fresh trespass." Holmes v. Wilson, 10 Adol. & E. 503. Brewer, J., said that it was very doubtful whether this ruling could be sustained upon principle. Kansas Pac. Ry. Co. v. Mihlman, 17 Kan. 232.

[188] National Copper Co. v. Minnesota Min. Co., supra.

[189] In Whitehouse v. Fellowes, 10 C. B. (N. S.) 765, it was said by counsel, arguendo: "The distinction which pervades the cases is this: Where the plaintiff complains of a trespass, the statute runs from the time when the act of trespass was committed, except in the case of a continuing trespass. But where the cause of action is not in itself a trespass, as an act done upon a man's own land, and the cause of action is the consequential injury to the plaintiff, there the period of limitation runs from the time the damage is sustained." Approved by Cooley, J., in National Copper Co. v. Minnesota Min. Co., 57 Mich. 83, 23 N. W. 781.

the light from the tenant's doors and windows, that damages could only be recovered for the time which had elapsed when the suit was commenced, and not for the whole term.[190] So, where a railroad company constructed a culvert under its embankment, which damaged land by discharging water upon it, it was held that the case fell within the ordinary rule applicable to continuing nuisances and trespasses.[191]

As before stated, all the cases are not consistent with these conclusions, but there is ample authority to sustain them, and it is submitted that they are sound in principle.

ELEMENTS OF COMPENSATION.

34. Damage in respect to anything in the enjoyment of which one is protected by law may be a subject for compensation.

35. Damage for which the law affords compensation may be divided into three classes:

(a) Pecuniary losses, direct and indirect (p. 87).

(b) Physical pain and inconvenience (p 91).

(c) Mental suffering (p. 92).

It has been seen that the law awards damages only for injuries to person, property, or reputation. An injury in any one of these respects may affect one in one or more of three ways. It may cause (1) pecuniary loss, direct or indirect; (2) physical pain and inconvenience; and (3) mental suffering. All three are proper elements of compensation to be considered in estimating damages. Compensation is necessarily awarded in money, and it will be observed that but one of the elements of damage is pecuniary. Breaches of contract and interference with property rights, where the sole question is as to the value of the property involved, may result solely in pecuniary damage. Damage is said to be pecuniary either when money itself is lost, or the damage is such as can be, and usually is

[190] Blunt v. McCormick, 3 Denio, 283.

[191] Wells v. New Haven & Northampton Co., 151 Mass. 46, 23 N. E. 724. See, also, Uline v. Railroad Co., 101 N. Y. 98, 4 N. E. 536. Cf. Fowle v. New Haven & Northampton Co., 112 Mass. 334.

measured by a pecuniary standard.[192] But usually where the injury is to the person, and in some classes of contracts, the damage will be, in part at least, nonpecuniary. Thus, a physical injury may result in pecuniary loss from diminished earning power, and also in physical and mental suffering. Physical and mental suffering are nonpecuniary, though none the less actual, elements of injury, and must be compensated in money, though there is no pecuniary standard by which they may be measured. The extent of compensation for such injuries is for the jury.

SAME—PECUNIARY LOSSES.

36. Compensation for all pecuniary losses which are the proximate and certain result of the cause of action may be recovered, except—

EXCEPTION—Counsel fees incurred in litigation caused by the wrong are usually not recoverable.

Generally speaking, pecuniary losses are always an element in estimating the damages caused by a wrong. Indeed, in the great majority of cases, it is the most important one. Pecuniary losses are sustained whenever property is taken or damaged, when the profits of a contract are lost, or one's earning capacity diminished. Other forms of pecuniary loss will readily occur to every mind. As a general rule, compensation is always recoverable for such losses when they are the proximate and certain result of an actionable wrong.

Expenses of Litigation.

The expenses of litigation to obtain compensation for a wrong, though the natural and probable consequence of an injury, cannot usually be recovered as damages.[194] "In general, the law considers

[192] Sedg. Dam. p. 95.

[194] CONTRACTS. Goodbar v. Lindsley, 51 Ark. 380, 11 S. W. 577; Vorse v. Phillips, 37 Iowa, 428; Offutt v. Edwards, 9 Rob. (La.) 90.

TORTS. Flanders v. Tweed, 15 Wall. 450; Winstead v. Hulme, 32 Kan. 568, 4 Pac. 994; Kelly v. Rogers, 21 Minn. 146; Winkler v. Roeder, 23 Neb. 706, 37 N. W. 607; Atkins v. Gladwish, 25 Neb. 390, 41 N. W. 347; Hicks v. Foster, 13 Barb. 663; Welch v. Railroad Co., 12 Rich. Law, 290; Barnard v. Poor, 21 Pick. 378; Bishop v. Hendrick, 82 Hun, 323, 31 N. Y. Supp. 502. Not

the taxed costs as the only damage which a party sustains by the defense of a suit against him, and these he recovers by the judgment in his favor."[195] The rule excludes compensation for counsel[196] and witness[197] fees, and for time and expense in attending court.[198] The law has arbitrarily fixed the taxable costs as the limit of compensation for this class of losses.[199] Beyond this, the loss is damnum absque injuria. In some states a recovery for expenses beyond taxable costs has been allowed in cases where exemplary damages

even when the action was vexatious. Salado College v. Davis, 47 Tex. 131. In some cases, the jury have been permitted to consider such expenses for the purpose of giving full indemnity. Whipple v. Cumberland Manuf'g Co., 2 Story, 661, Fed. Cas. No. 17,516; Platt v. Brown, 30 Conn. 336; Welch v. Durand, 36 Conn. 182; Finney v. Smith, 31 Ohio St. 529; Armstrong v. Pierson, 8 Iowa, 29; Rose v. Belyea, 1 Hann, 109.

Counsel fees in admiralty suits are not allowed, Arcambel v. Wiseman, 3 Dall. 306; The Margaret v. The Connestoga, 2 Wall. Jr. 116, Fed. Cas. No. 9,070; though the rule has been doubted, The Appollon, 9 Wheat. 362; Canter v. American Ins. Co., 3 Pet. 307. Nor in patent suits, Blanchard's Gun-Stock Turning Factory v. Warner, 1 Blatchf. 258, Fed. Cas. No. 1,521; Stimpson v. The Railroads, 1 Wall. Jr. 164, Fed. Cas. No. 13,456; Whittemore v. Cutter, 1 Gall. 429, Fed. Cas. No. 17,600, though the contrary has been held, Boston Manuf'g Co. v. Fiske, 2 Mason, 119, Fed. Cas. No. 1,681; Pierson v. Eagle Screw Co., 3 Story, 402, Fed. Cas. No. 11,156; Allen v. Blunt, 2 Woodb. & M. 121, Fed. Cas. No. 217. Where an assessment is made for a contractor, and is held invalid in his suit against the owner to collect it, in a subsequent action against the city to recover the contract price of the work the contractor cannot recover counsel fees in the prior suit. City of Toledo v. Goulden, 3 Ohio Dec. 124; City of Cincinnati v. Steadman, 8 Ohio Cir. Ct. R. 407. Where a city erroneously assumes that a certain way is a public street, and passes an ordinance to change its grade, an abutting owner is entitled to recover of the city the expense incurred by him in showing that it has no rights in such way. Huckestein v. Allegheny City, 165 Pa. St. 367, 30 Atl. 982. Where property is wrongfully seized on execution, the owner is entitled to a reasonable amount for attorney's fees expended in an action to protect his rights. Gilkerson-Sloss Commission Co. v. Yale, 17 South. 244, 47 La. Ann. 690.

[195] Young v. Courtney, 13 La. Ann. 193. See, also, Adams v. Cordis, 8 Pick. 260.

[196] Oelrichs v. Spain, 15 Wall. 211; Henry v. Davis, 123 Mass. 345; Warren v. Cole, 15 Mich. 265; Haverstick v. Erie Gas Co., 29 Pa. St. 254; Guild v. Guild, 2 Metc. (Mass.) 229.

[197] Gulf, C. & S. F. Ry. Co. v. Campbell, 76 Tex. 174, 13 S. W. 19.

[198] Jacobson v. Poindexter, 42 Ark. 97.

[199] Sedg. Dam. 339.

have been held proper;[200] but these cases have not been generally followed, and are difficult to be sustained on principle, for such damages are plainly compensatory.[201] "The punishment of defendant's delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit."[202]

Same—Expenses of Prior Litigation.

Where one has in good faith defended an action for the benefit of another, or on account of the latter's wrong, he may, in a subsequent action, recover his costs and expenses, including reasonable counsel fees, if the prior litigation was a natural consequence of the wrong, and necessary to determine the rights of the parties.[203] The

[200] Wynne v. Parsons, 57 Conn. 73, 17 Atl. 362; Linsley v. Bushnell, 15 Conn. 225; Bennett v. Gibbons, 55 Conn. 450, 452, 12 Atl. 99; Mason v. Hawes, 52 Conn. 12. In Noyes v. Ward, 19 Conn. 250, where a second trial became necessary in an action for assault and battery, it was held that the expenses of the first trial might be considered. See, also, Finney v. Smith, 31 Ohio St. 529; Stevenson v. Morris, 37 Ohio St. 10; Peckham Iron Co. v. Harper, 41 Ohio St. 100; Roberts v. Mason, 10 Ohio St. 277; Thompson v. Powning, 15 Nev. 195; Titus v. Corkins, 21 Kan. 722; Marshall v. Betner, 17 Ala. 832; New Orleans, J. & G. N. R. Co. v. Allbritton, 38 Miss. 242; Taylor v Morton, 61 Miss. 24; Landa v. Obert, 45 Tex. 539.

[201] Howell v. Scoggins, 48 Cal. 355; Falk v. Waterman, 49 Cal. 224; Kelly v. Rogers, 21 Minn. 146; Halstead v. Nelson, 24 Hun, 395; Welch v. Railroad Co., 12 Rich. Law, 290; Hoadley v. Watson, 45 Vt. 289; Earl v. Tupper, Id. 275.

[202] Day v. Woodworth, 13 How. 363, 371. Approved in Oelrichs v. Spain, 15 Wall. 211. See, also, Fairbanks v. Witter, 18 Wis. 287, 290.

[203] Baxendale v. Railway Co., L. R. 10 Exch. 35; Dubois v. Hermance, 56 N. Y. 673; Hughes v. Graeme, 33 Law J. Q. B. 335; Inhabitants of Westfield v. Mayo, 122 Mass. 100. Where the litigation was unnecessary, neither costs nor counsel fees can be recovered. Lunt v. Wrenn, 113 Ill. 168. In an action on an injunction or attachment bond, counsel fees in obtaining a dissolution of the injunction or attachment may be recovered. Holmes v. Weaver, 52 Ala. 516; Bolling v. Tate, 65 Ala. 417; Graves v. Moore, 58 Cal. 435; Wittich v. O'Neal, 22 Fla. 592; Cummings v. Burleson, 78 Ill. 281; Morris v. Price, 2 Blackf. 457; Raupman v. City of Evansville, 44 Ind. 392; Swan v. Timmons, 81 Ind. 243; Sanford v. Willetts, 29 Kan. 647; Tyler v. Safford, 31 Kan. 608, 3 Pac. 333; Trapnall v. McAfee, 3 Mete. (Ky.) 34; Littlejohn v. Wilcox, 2 La. Ann. 620; Swift v. Plessner, 39 Mich. 178; Miles v. Edwards, 6 Mont. 180, 9 Pac. 814; Raymond Bros. v. Green, 12 Neb. 215, 10 N. W. 709; Brown v. Jones, 5 Nev. 374; Corcoran v. Judson, 24 N. Y. 106; Andrews v. Glenville Woolen Co., 50 N. Y. 282; Rose v. Post, 56 N. Y. 603; Alexander v.

rule is not universal, however.[204] Where plaintiff was successful in the prior litigation, it is sometimes held that counsel fees cannot be recovered, for he has received the taxed costs, which are regarded in the eyes of the law as full indemnity. But, as Mr. Sedg-

Jacoby, 23 Ohio St. 358; Lillie v. Lillie, 55 Vt. 470. Contra, Oliphint v Mansfield, 36 Ark. 191; Patton v. Garrett, 37 Ark. 605; Wallace v. York, 45 Iowa, 81; Lowenstein v. Monroe, 55 Iowa, 82, 7 N. W. 406. In Baggett v. Beard, 43 Miss. 120, the expense of the principal suit was held recoverable in an action on an injunction bond. But the weight of authority is the other way. See Frost v. Jordon, 37 Minn. 544, 36 N. W. 713; Jacobus v. Monongahela Nat. Bank, 35 Fed. 395; Randall v. Carpenter, 88 N. Y. 293; Alexander v. Jacoby, 23 Ohio St. 358; Lillie v. Lillie, 55 Vt. 470; Copeland v. Cunningham, 63 Ala. 394; Bustamente v. Stewart, 55 Cal. 115; Vorse v. Phillips, 37 Iowa, 428; Brinker v. Leinkauff, 64 Miss. 236, 1 South. 170. In an action for breach of covenants of seisin or warranty, or for false representations, the reasonable counsel fees in litigation in which one engaged, relying on the covenant or representation, may be recovered if it was a legitimate consequence of the covenant or representation. Sedg. Dam. 356; Levitzky v. Canning, 33 Cal. 299; Harding v. Larkin, 41 Ill. 413; Robertson v. Lemon, 2 Bush, 301; Ryerson v. Chapman, 66 Me. 557; Allis v. Nininger, 25 Minn. 525; Kennison v. Taylor, 18 N. H. 220; Keeler v. Wood, 30 Vt. 242; Smith v. Sprague, 40 Vt. 43; Dalton v. Bowker, 8 Nev. 190. Contra, Jeter v. Glenn, 9 Rich. Law, 374; Clark v. Mumford, 62 Tex. 531. In Massachusetts, it has been held that the costs, but not the counsel fees, may be recovered. See Leffingwell v. Elliott, 10 Pick. 204; Reggio v. Braggiotti, 7 Cush. 166. The same principles apply in actions on indemnity bonds. Hadsell v. Hancock, 3 Gray, 526; Kansas City Hotel Co. v. Sauer, 65 Mo. 279; Graves v. Moore, 58 Cal. 435. But see Russell v. Walker, 150 Mass. 351, 23 N. E. 383, and McDaniel v. Crabtree, 21 Ark. 431.

When, as the necessary and proximate consequence of a breach of contract, plaintiff is compelled to engage in litigation, his reasonable expenses may be recovered. Dubois v. Hermance, 56 N. Y. 673; New Haven & N. Co. v. Hayden, 117 Mass. 433; Hagan v. Riley, 13 Gray, 515; Pond v. Harris, 113 Mass. 114; Call v. Hagar, 69 Me. 521; Shaw v. Mayor, etc., of Macon, 19 Ga. 468; Ottumwa v. Parks, 43 Iowa, 119; Henderson v. Squire, L. R. 4 Q. B. 170. "If a party is obliged to defend against the act of another, against whom he has a remedy over, and defends solely and exclusively the act of such other party, and is compelled to defend no misfeasance of his own, he may notify such party of the pendency of the suit, and may call upon him to defend it. If he fails to defend, then, if liable over, he is liable, not only for the amount of damages recovered, but for all reasonable and necessary expenses incurred

[204] Leffingwell v. Elliott, 10 Pick. 204; Reggio v. Braggiotti, 7 Cush. 166.

wick has said,[205] in speaking of the legal fiction that the taxable costs are a full indemnity for the expenses of litigation, it is very doubtful if the rule ever applies except as between the parties to the suit, for the reason of the rule is that the taxable costs are an arbitrary sum awarded by law to be paid by the losing to the prevailing party.

SAME—PHYSICAL PAIN AND INCONVENIENCE.

37. Compensation may always be recovered for physical pain which is the proximate and certain result of a wrong.

38. Inconvenience amounting to physical discomfort may be compensated.

Physical pain or inconvenience which is the proximate and certain result of a wrong is always an element of compensation.[206]

in such defense." Inhabitants of Westfield v. Mayo, 122 Mass. 100. See, also, Ottumwa v. Parks, 43 Iowa, 119; Griffin v. Brown, 2 Pick. 304; Osborne & Co. v. Ehrhard, 37 Kan. 413, 15 Pac. 590; Hynes v. Patterson, 95 N. Y. 1. Notice of suit is essential to liability. Lowell v. Boston & L. R. Co., 23 Pick. 24; Chase v. Bennett, 59 N. H. 394. In an action for malicious prosecution, the expenses of the malicious proceeding may be recovered. Lawrence v. Hagerman, 56 Ill. 68; Krug v. Ward, 77 Ill. 603; Ziegler v. Powell, 54 Ind. 173; McCardle v. McGinley, 86 Ind. 538; Lytton v. Baird, 95 Ind. 349; Gregory v. Chambers, 78 Mo. 294; Magmer v. Renk, 65 Wis. 364, 27 N. W. 26. But the expense of setting stock aside as exempt is not recoverable as damages in an action for maliciously suing out a distress warrant. Sturgis v. Frost, 56 Ga. 188. The expense of procuring a discharge from imprisonment may be recovered in an action for false imprisonment. Bonesteel v. Bonesteel, 30 Wis. 511; Parsons v. Harper, 16 Grat. 64; Blythe v. Tompkins, 2 Abb. Prac. 468; Foxall v. Barnett, 2 El. & Bl. 928; Pritchet v. Boevey, 1 Cromp. & M. 775. Contra, Bradlaugh v. Edwards, 11 C. B. (N. S.) 377.

[205] Sedg. Dam. § 349.

[206] Pierce v. Millay, 44 Ill. 189; Indianapolis & St. L. R. Co. v. Stables, 62 Ill. 313; City of Chicago v. Jones, 66 Ill. 349; City of Chicago v. Langlass, Id. 361; City of Chicago v. Elzeman, 71 Ill. 131; Chicago & E. R. Co. v. Holland, 122 Ill. 461, 13 N. E. 145; McKinley v. Railroad Co., 44 Iowa, 314; Stafford v. City of Oskaloosa, 61 Iowa, 251, 20 N. W. 174; Fleming v. Town of Shenandoah, 71 Iowa, 456, 32 N. W. 456; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695; Stephens v. Railroad Co., 96 Mo. 207, 9 S. W. 589; Ridenhour v.

The amount of damages awarded is necessarily left to the sound discretion of the jury, for there is no arithmetical rule by which the equivalent of such injuries in money can be estimated. Damages cannot be recovered for inconvenience or annoyance,[207] unless it amounts to physical discomfort.[208] "The injury must be physical, as distinguished from one purely imaginative. It must be something that produces real discomfort or annoyance through the medium of the senses, not from delicacy of taste or refined fancy." [209]

SAME—MENTAL SUFFERING.

39. Mental suffering standing alone will not support an action where damages is the gist of the wrong.

40. Mental suffering which is the proximate and certain result of conduct actionable per se, whether a tort or breach of contract, may be compensated.

EXCEPTION—In many states compensation cannot be recovered for mental suffering resulting from a breach of contract.

Mental Suffering as the Basis of a Cause of Action.

It has been doubted whether compensation can ever be recovered for mental suffering as distinguished from physical suffering.[210]

Railway Co., 102 Mo. 270, 13 S. W. 889, and 14 S. W. 760; Pennsylvania & O. Canal Co. v. Graham, 63 Pa. St. 290; Lake Shore & M. S. Ry. Co. v. Frantz, 127 Pa. St. 297, 18 Atl. 22; Goodno v. Oshkosh, 28 Wis. 300.

[207] Hamlin v. Railway Co., 1 Hurl. & N. 408; Hunt v. D'Orval, Dud. (S. C.) 180; Connell v. Telegraph Co., 116 Mo. 34, 22 S. W. 345; Russell v. Telegraph Co., 3 Dak. 315, 19 N. W. 408; Wilcox v. Railroad Co., 3 C. C. A. 73, 52 Fed. 264; Yoakum v. Dunn, 1 Tex. Civ. App. 524, 21 S. W. 411.

[208] Chicago & A. R. Co. v. Flagg, 43 Ill. 364; Southern Kan. Ry. Co. v. Rice, 38 Kan. 398, 16 Pac. 817; Emery v. City of Lowell, 109 Mass. 197; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695; Luse v. Jones, 39 N. J. Law, 707; Ives v. Humphreys, 1 E. D. Smith, 196; Scott Tp. v. Montgomery, 95 Pa. St. 444. But see Walsh v. Railway Co., 42 Wis. 23.

[209] Westcott v. Middleton, 43 N. J. Eq. 478, 486, 11 Atl. 490; Id., 44 N. J. Eq. 297, 18 Atl. 80. And see Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052.

[210] "Mental suffering, as a distinct element of damage in addition to bodily suffering, has been held not a subject for compensation." Sedg. Dam. § 44;

The reason usually given is that such suffering, as a ground for the recovery of damages, is vague, sentimental, or metaphysical; that the suffering of one person is no criterion by which to estimate the sufferings of another, differently constituted, and that it is too difficult to be weighed and assessed on the basis of a pecuniary compensation.[211] But mental suffering is no more vague, fluctuating, or difficult to estimate than physical suffering which is always a subject for compensation; nor is it any the less real. "Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is that one is internal, and the other external; one mental, the other physical. In either case the damage is not measurable with exactness. There can be a closer approximation in estimating the damage to a limb than to the feelings; but, at the last, the amount is indefinite."[212] Where the law recognizes a right to compensation for an injury, difficulty in estimating the extent of the injury has never been regarded as a ground for withholding all damages.[213] The law solves such difficulties by leaving them to the sound discretion of a jury.[214] The real reason for refusing compensation for purely mental sufferings is that mental tranquillity is not a right recognized and protected by law.[215] The law does not provide a remedy for every possible injury which a man may suffer. It protects his person, his property, and his reputation, but his emotions are beyond the domain of rights protected by law. An act causing mental suffering alone is therefore not a tort, for no legal right is invaded. Where the negligent or wrongful act of one person puts another in a position of peril, and thereby causes

Joch v. Dankwardt, 85 Ill. 331; City of Salina v. Trosper, 27 Kan. 544; Johnson v. Wells, Fargo & Co., 6 Nev. 224. Contra, see Lunsford v. Dietrich, 86 Ala. 250, 5 South. 461; Pittsburgh, C. & St. L. Ry. Co. v. Sponier, 85 Ind. 165; Moyer v. Gordon, 113 Ind. 282, 14 N. E. 476; Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. 864; Shepard v. Railway Co., 77 Iowa, 54, 41 N. W. 564; Porter v. Railway Co., 71 Mo. 66. And see Pennsylvania R. Co. v. Kelly, 31 Pa. St. 372; Oakland Ry. Co. v. Fielding, 48 Pa. St. 320.

211 Wadsworth v. Telegraph Co., 86 Tenn. 721, 8 S. W. 582.

212 Head v. Railway Co., 79 Ga. 358, 7 S. E. 217.

213 Wadsworth v. Telegraph Co., 86 Tenn. 695, 711, 8 S. W. 574.

214 Young v. Telegraph Co., 107 N. C. 370, 11 S. E. 1044; Lucas v. Flinn, 35 Iowa, 9; Ballou v. Farnum, 11 Allen, 73, 77, 78.

215 See ante, c. 1.

fear and apprehension in the mind of the latter, but no actual harm results, there is no cause of action.[216] Negligence is not a tort, unless it results in damage with respect to a right protected by law. So, also, defamatory words are not actionable, unless followed by damage, actual or presumed. Therefore, if the words are not actionable per se, and no special damage is proved, the mere fact that the words cause mental anguish will not support the action.[217] Wherever actual damage is necessary to render an act a legal wrong,—that is, where damages are the gist of the action,—proof of mental suffering alone will not support a recovery.*

[216] Canning v. Williamstown, 1 Cush. 451; Atchison, T. & S. F. R. Co. v. McGinnis, 46 Kan. 109, 26 Pac. 453; Terre Haute & I. R. Co. v. Brunker, 128 Ind. 542, 26 N. E. 178; Ft. Worth & D. C. Ry. Co. v. Burton (Tex. App.) 15 S. W. 197; Gulf, C. & S. F. Ry. Co. v. Trott, 86 Tex. 412, 25 S. W. 419; Wyman v. Leavitt, 71 Me. 227; Ewing v. Railway Co., 147 Pa. St. 40, 23 Atl. 340. Contra, Yoakum v. Kroeger (Tex. Civ. App.) 27 S. W. 953. Where, however, the fright or shock causes illness, nervous prostration, or any other physical injury, the original fault is the proximate cause of the injury; and compensation may be recovered, not for the fright, but for the results of it. Smith v. Railway Co., 30 Minn. 169, 14 N. W. 797; Purcell v. Railway Co., 48 Minn. 134, 50 N. W. 1034; Mitchell v. Railway Co., 4 Misc. Rep. 575, 25 N. Y. Supp. 744; Bell v. Railway Co., 26 L. R. Ir. 428, disapproving Victorian Railways Commissioners v. Coultas, 13 App. Cas. 222. See, also, Fitzpatrick v. Railway Co., 12 U. C. Q. B. 645; Oliver v. Town of La Valle, 36 Wis. 592; Bray v. Latham, 81 Ga. 640, 8 S. E. 64; Lehman v. Railroad Co., 47 Hun, 355; Yoakum v. Kroeger (Tex. Civ. App.) 27 S. W. 953; Warren v. Boston & M. R. Co., 163 Mass. 484, 40 N. E. 895. Where the fear or anxiety, instead of causing the physical injury, accompanies it, as a concomitant or incident, the injury being proved, compensation may be had for the mental suffering. The physical injury supports the action. Allen v. Railway Co. (Tex. Civ. App.) 27 S. W. 943; Fell v. Railroad Co., 44 Fed. 248.

[217] Lynch v. Knight, 9 H. L. Cas. 577, 598.

* In an action for injuring plaintiff's horse in a brutal manner, accompanying the act with malicious insults, plaintiff is entitled to damages for mental suffering. Kimball v. Holmes, 60 N. H. 163. But where defendant circulated reports about plaintiff which caused him mental suffering, but were not otherwise actionable, he cannot recover for mental suffering. Terwilliger v. Wands, 17 N. Y. 54. But, if the words had been actionable per se, damages for mental suffering could have been recovered. Adams v. Smith, 58 Ill. 417. It is difficult to see any sound reason for the distinction.

Mental Suffering in Actions of Tort.

Compensation for mental suffering which is the natural, proximate, and certain result of a tort may be recovered.[218] While com-

[218] PERSONAL INJURY. In actions for personal injuries, the damages should include an allowance for mental suffering in so far as it was attendant on the physical injury, and inseparably connected with it, or a necessary result of it. Van de Venter v. Railway Co., 26 Fed. 32; Anthony v. Railroad Co., 27 Fed. 724; Robertson v. Cornelson, 34 Fed. 716; Carpenter v. Railroad Co., 39 Fed. 315; The Queen, 40 Fed. 694; Saldana v. Railroad Co., 43 Fed. 862; Davidson v. Southern Pac. Co., 44 Fed. 476; Ware v. Water Co., 1 Dill. 465, Fed. Cas. No. 17,172; Drinkwater v. Dinsmore, 16 Hun, 250; Ransom v. Railroad Co., 15 N. Y. 415; Curtis v. Railroad Co., 18 N. Y. 534; Walker v. Railroad Co., 63 Barb. 260; Demann v. Railroad Co., 10 Misc. Rep. 191, 30 N. Y. Supp. 926; Indianapolis & St. L. R. Co. v. Stables, 62 Ill. 313; Toledo, W. & W. R. Co. v. Baddeley, 54 Ill. 19; Peoria Bridge Ass'n v. Loomis, 20 Ill. 235; Hannibal & St. J. R. Co. v. Martin, 111 Ill. 219; City of Chicago v. McLean, 133 Ill. 148, 24 N. E. 527; Central Ry. Co. v. Serfass, 153 Ill. 379, 39 N. E. 119; Wabash & W. R. Co. v. Morgan, 132 Ind. 430, 31 N. E. 661, and 32 N. E. 85; Town of Nappanee v. Ruckman, 7 Ind. App. 361, 34 N. E. 609; Muldowney v. Railroad Co., 36 Iowa, 462; Ferguson v. Davis Co., 57 Iowa, 601, 10 N. W. 906; Kendall v. City of Albia, 73 Iowa, 241, 34 N. W. 833; Weber v. City of Creston, 75 Iowa, 16, 39 N. W. 126; Fleming v. Town of Shenandoah, 71 Iowa, 456, 32 N. W. 456; Porter v. Railroad Co., 71 Mo. 66; Sidekum v. Railroad Co., 93 Mo. 400, 4 S. W. 701; Ridenhour v. Railroad Co., 102 Mo. 270, 13 S. W. 889, and 14 S. W. 760; Houston & G. N. R. Co. v. Randall, 50 Tex. 254; Gallagher v. Bowie, 66 Tex. 265, 17 S. W. 407; Texas Mex. R. Co. v. Douglas, 73 Tex. 325, 11 S. W. 333; Richmond & D. R. Co. v. Norment, 84 Va. 167, 4 S. E. 211; Alexander v. Humber, 86 Ky. 565, 6 S. W. 453; Scott Tp. v. Montgomery, 95 Pa. St. 444; Stockton v. Frey, 4 Gill. 406; McMahon v. Railroad Co., 39 Md. 438; Giblin v. McIntyre, 2 Utah, 384; Larmon v. District of Columbia, 5 Mackey, 330; Fairchild v. Stage Co., 13 Cal. 599; Memphis & C. R. Co. v. Whitfield, 44 Miss. 466; City of Salina v. Trosper, 27 Kan. 544; Montgomery & E. R. Co. v. Mallette, 92 Ala. 209, 9 South. 363; Kinney v. Folkerts, 84 Mich. 616, 48 N. W. 283; Lawrence v. Railroad Co., 29 Conn. 390; McMillan v. Brick Works, 6 Mo. App. 431; Wallace v. Railroad Co. (Super. Del.) 18 Atl. 818; Cooper v. Mullins, 30 Ga. 146. Connell v. Telegraph Co., 116 Mo. 34, 22 S. W. 345. Mental suffering will be inferred from severe physical injury, without direct proof that such sufferings ensued. Brown v. Sullivan, 71 Tex. 470, 10 S. W. 288. Mental pain is not a distinct element of damage, in addition to or apart from bodily suffering. Johnson v. Wells, Fargo & Co., 6 Nev. 224; Joch v. Dankwardt, 85 Ill. 331; Galveston, H. & S. A. R. Co. v. Porfert, 72 Tex. 344, 10 S. W. 207. Instructions approved. See Hanford v. City of Kansas, 103 Mo. 172, 15 S. W. 753; Kennon

pensation for mental suffering alone cannot be recovered, where the same act that causes mental suffering also injures plaintiff in

v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696. Compensation for shock to the feelings attendant on personal injury may be recovered. Seger v. Town of Barkhamsted, 22 Conn. 290; Masters v. Town of Warren, 27 Conn. 293.

ASSAULT AND BATTERY. In a civil action for assault and battery, compensation may be recovered for mental suffering, wounded feelings, dishonor, indignity, or disgrace. Boyle v. Case, 18 Fed. 880, 9 Sawy. 386; Schelter v. York, Crabbe, 449, Fed. Cas. No. 12,446; West v. Forrest, 22 Mo. 344; Slater v. Rink, 18 Ill. 527; Gaither v. Blowers, 11 Md. 536; Fay v. Swan, 44 Mich. 544, 7 N. W. 215; Sloan v. Edwards, 61 Md. 89; Groman v. Kukkuck, 59 Iowa, 18, 12 N. W. 748; Lucas v. Flinn, 35 Iowa, 9; Root v. Sturdivant, 70 Iowa, 55, 29 N. W. 802; Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468; Barnes v. Martin, 15 Wis. 240; Barbee v. Reese, 60 Miss. 906; Ward v. Blackwood, 48 Ark. 396, 3 S. W. 624; Morgan v. Curley, 142 Mass. 107, 7 N. E. 726; Smith v. Holcomb, 99 Mass. 552; Tatnall v. Courtney, 6 Houst. 434; Smith v. Overby, 30 Ga. 241; Nossaman v. Rickert, 18 Ind. 350; Cox v. Vanderkleed, 21 Ind. 164; Wadsworth v. Treat, 43 Me. 163; Beck v. Thompson, 31 W. Va. 459, 4 S. E. 447; Lunsford v. Walker, 93 Ala. 36, 8 South. 386; Taber v. Hutson, 5 Ind. 322; Craker v. Railway Co., 36 Wis. 657; McIntyre v. Giblin, 131 U. S. 174, Append.; Hawes v. Knowles, 114 Mass. 518; Townsend v. Briggs (Cal.) 32 Pac. 307.

INDECENT ASSAULT. The damages recoverable for an indecent assault upon a woman include compensation for plaintiff's shock, fright, outraged feelings, anguish of mind, shame and humiliation, and loss of honor or good name. Wolf v. Trinkle, 103 Md. 355, 3 N. E. 110; Fay v. Swan, 44 Mich. 544, 7 N. W. 215; Alexander v. Blodgett, 44 Vt. 476; Ford v. Jones, 62 Barb. 484; Newell v. Whitcher, 53 Vt. 589.

INJURY TO CHILD—RECOVERY BY PARENT. In an action by a father for an injury to his child, plaintiff may recover for his own mental suffering, but not for those of the child. Durkee v. Railroad Co., 56 Cal. 388; Trimble v. Spiller, 7 T. B. Mon. 394. Contra, Flemington v. Smithers, 2 Car. & P. 292. The cases of Pennsylvania R. Co. v. Kelly, 31 Pa. St. 372, and Oakland R. Co. v. Fielding, 48 Pa. St. 320, apparently holding the contrary, proceed on the theory that mental suffering can never be compensated. Black v. Railroad Co., 10 La. Ann. 33, and Whitney v. Hitchcock, 4 Denio, 461, went off on the notion that such damages were exemplary.

CIVIL DAMAGE LAWS. The statutes giving a right of action for injuries caused by the unlawful sale of intoxicating liquor usually give redress only for injury to person, property, or means of support, and therefore mental suffering alone will not support the action. Black. Intox. Liq. § 309; Mulford v. Clewell, 21 Ohio St. 191; Koerner v. Oberly, 56 Ind. 284; Brantigam v. While, 73 Ill. 561; Freese v. Tripp, 70 Ill. 496; Flynn v. Fogarty, 106 Ill. 263; Kearney v. Fitzgerald, 43 Iowa, 580; Jackson v. Noble, 54 Iowa, 641, 7

respect to a right protected by law, as in regard to his person, property, or reputation, the law, in redressing such injury, will

N. W. 88; Welch v. Jugenheimer, 56 Iowa, 11, 8 N. W. 673; Clinton v. Laning, 61 Mich. 355, 28 N. W. 125; Johnson v. Schultz, 74 Mich. 75, 41 N. W. 865. But where there is a cause of action falling within the statute, mental suffering connected therewith may be taken into account. Pegram v. Stortz, 31 W. Va. 220, 6 S. E. 485; Friend v. Dunks, 37 Mich. 25; Ward v. Thompson, 48 Iowa, 588; Peterson v. Knoble, 35 Wis. 80.

TRESPASS FOR INJURIES TO REALTY AND PERSONALTY. Mental suffering is not usually a natural or a proximate consequence of a trespass or injury to property. White v. Dresser, 135 Mass. 150. In forcible entry and detainer, damages for mental suffering cannot be recovered. Anderson v. Taylor, 56 Cal. 131. Where one obtains property by duress of threats, mental and physical suffering is not a proximate consequence. Wulstein v. Mohlman (Super. Ct.) 5 N. Y. Supp. 569. But, where a landlord wrongfully evicted a tenant, it was held that the latter could recover for mental suffering at having his family turned into the street. Moyer v. Gordon, 113 Md. 282, 14 N. E. 476; Fillebrown v. Hoar, 124 Mass. 580. Cf. Smith v. Grant, 56 Me. 255. Damages for mental suffering have been allowed in actions for taking property under an unlawful search warrant, Melcher v. Scruggs, 72 Mo. 406; for suing out a vexatious attachment, City Nat. Bank v. Jeffries, 73 Ala. 183; Byrne v. Gardner, 33 La. Ann. 6; for carrying away a valuable paper, Bonelli v. Bowen, 70 Miss. 142, 11 South. 791; and for beating plaintiff's horse, Kimball v. Holmes, 60 N. H. 163. A physician has been held liable for mental suffering and shame caused by his taking an unprofessional, unmarried man with him to attend a confinement case. De May v. Roberts, 46 Mich. 160, 9 N. W. 146.

EJECTION OF PASSENGER BY CARRIER. The wrongful ejection of a passenger from a public conveyance is not only a breach of contract, but is also a tort. Hence, compensation for the humiliation, insult, and indignity put upon him may be recovered. Coppin v. Braithwaite, 8 Jur. 875; Gallena v. Railroad Co., 13 Fed. 116; Murphy v. Railroad Co., 23 Fed. 637; Quigley v. Railroad Co., 5 Sawy. 107, Fed. Cas. No. 11,510; Id., 11 Nev. 350; McKinley v. Railroad Co., 44 Iowa, 314; Shepard v. Railroad Co., 77 Iowa, 54, 41 N. W. 564; Carsten v. Railroad Co., 44 Minn. 454, 47 N. W. 49; Hoffman v. Railroad Co., 45 Minn. 53, 47 N. W. 312; Serwe v. Railroad Co., 48 Minn. 78, 50 N. W. 1021; Perry v. Railway Co., 153 Pa. St. 236, 25 Atl. 772; Baltimore & O. R. Co. v. Bambrey (Pa. Sup.) 16 Atl. 67; Hays v. Railroad Co., 46 Tex. 272; International & G. N. R. Co. v. Smith (Tex. Sup.) 1 S. W. 565; International & G. N. R. Co. v. Wilkes, 68 Tex. 617, 5 S. W. 491; Pennsylvania R. Co. v. Spicker, 105 Pa. St. 142; Taber v. Hutson, 5 Ind. 322; Toledo, W. & W. R. Co. v. McDonough, 53 Ind. 289; Lake Erie & W. R. Co. v. Fix, 88 Ind. 381; Chicago, St. L. & P. R. Co. v. Holdridge, 118 Ind. 281, 20 N. E. 837; Chicago & N. W. R. Co. v. Chisholm, 79 Ill. 584; Chicago & N. W. R. Co. v. Williams, 55 Ill. 185; Lake Erie & W. R. Co. v. Christison, 39 Ill. App. 495; Pennsylvania

also award to plaintiff a suitable compensation for his mental suffering, considered as an inseparable part of the general result of

R. Co. v. Connell, 127 Ill. 419, 20 N. E. 89; Little Rock & F. S. R. Co. v. Dean, 43 Ark. 529; Georgia R. Co. v. Homer, 73 Ga. 251; Head v. Railroad Co., 79 Ga. 358, 7 S. E. 217; Wilsey v. Railroad Co., 83 Ky. 511; Louisville & N. R. Co. v. Whitman, 79 Ala. 328; Smith v. Railroad Co., 23 Ohio St. 10; Hagan v. Railroad Co., 3 R. I. 88; Southern Kansas R. Co. v. Rice, 38 Kan. 398, 16 Pac. 817; Goddard v. Railway Co., 57 Me. 202; Allen v. Ferry Co., 46 N. J. Law, 198; Hamilton v. Railroad Co., 53 N. Y. 25 A person seeking passage in a particular car on a railroad train, who is excluded therefrom on account of her color alone, may recover for the indignity, vexation, and disgrace to which she has been subjected. Chicago & N. W. R. Co. v. Williams, 55 Ill. 185. Where the ejection was in good faith, and without violence, insult, or malice, the authorities are divided as to whether compensation can be recovered for mental suffering. The question was answered in the negative in Dorrah v. Railroad Co., 65 Miss. 14, 3 South. 36; Illinois Cent. R. Co. v. Sutton, 53 Ill. 397; Gorman v. Southern Pac. Co., 97 Cal. 1, 31 Pac. 1112; Finch v. Railroad Co., 47 Minn. 36, 49 N. W. 329; Houston City St. R. Co. v. Jageman (Tex. Civ. App.) 23 S. W. 628; and in the affirmative by Chicago & A. R. Co. v. Flagg, 43 Ill. 364; Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N. E. 439; Chicago & E. I. R. Co. v. Conley, 6 Ind. App. 9, 32 N. E. 96, 865; Curtis v. Railroad Co., 87 Iowa, 622, 54 N. W. 339; Willson v. Railroad Co., 5 Wash. St. 621, 32 Pac. 468, 34 Pac. 146. Where the passenger was put down at an improper place, damages may be recovered for mental suffering, if a natural and proximate consequence. Stutz v. Railroad Co., 73 Wis. 147, 40 N. W. 653; Missouri Pac. R. Co. v. Kaiser, 82 Tex. 144, 18 S. W. 305.

FALSE IMPRISONMENT. Compensation may be recovered for mental suffering caused by false imprisonment Jay v. Almy, 1 Woodb. & M. 262, Fed. Cas. No. 7,236; McCall v. McDowell, Deady, 233, Fed. Cas. No. 8,673; Catlin v. Pond, 101 N. Y. 649, 5 N. E. 41; Abrahams v. Cooper, 81 Pa. St. 232; Duggan v. Railroad Co., 159 Pa. St. 248, 28 Atl. 182, 186; Fenelon v. Butts, 53 Wis. 344, 10 N. W. 501; Parsons v. Harper, 16 Grat. 64; Stewart v. Maddox, 63 Md. 51; Hays v. Creary, 60 Tex. 445; Taylor v. Davis (Tex. Sup.) 13 S. W. 642; Coffin v. Varila (Tex. Civ. App.) 27 S. W. 956; Sorenson v. Dundas, 50 Wis. 335, 7 N. W. 259; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695; Ball v. Horrigan, 65 Hun, 621, 19 N. Y. Supp. 913; Hewlett v. George, 68 Miss. 703, 9 South. 885.

MALICIOUS PROSECUTION. Mental suffering may be compensated in an action for malicious prosecution. Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. 864; Vinal v. Core, 18 W. Va. 1; Fisher v. Hamilton, 49 Ind. 341; Hogg v. Pinckney, 16 S. C. 387; Coleman v. Allen, 79 Ga. 637, 5 S. E. 204; Lavender v. Hudgens, 32 Ark. 763; Yount v. Carney (Iowa) 60 N. W. 114; Lumsford v. Dietrich, 86 Ala. 250, 5 South. 461; McWilliams v. Hoban, 42 Md. 56; Malone v. Murphy, 2 Kan. 250; Fagnan v. Knox, 40 N. Y. Super. Ct. 41; Wheeler v.

the tort against him;[219] that is to say, where the act complained of will itself support the action, compensation for mental suffering

Hanson, 161 Mass. 370, 37 N. E. 382; Shannon v. Jones, 76 Tex. 141, 13 S. W. 477; Willard v. Holmes, Booth & Haydens, 2 Misc. Rep. 303, 21 N. Y. Supp. 998.

LIBEL AND SLANDER. In actions for defamation, if the words are not actionable per se, mental suffering alone will not render them actionable. But if the words are actionable per se, or if other special damage be shown to support the action, plaintiff's mental suffering may be compensated. Shattuc v. McArthur, 29 Fed. 136; Terwilliger v. Wands, 17 N. Y. 54; Gomez v. Joyce (Super. Ct.) 1 N. Y. Supp. 337; Wilson v. Goit, 17 N. Y. 442; Samuels v. Association, 6 Hun, 5; Hamilton v. Eno, 16 Hun, 599; Ward v. Deane (Sup.) 10 N. Y. Supp. 421; Lombard v. Lennox, 155 Mass. 70, 28 N. E. 1125; Mahoney v. Belford, 132 Mass. 393; Markham v. Russell, 12 Allen, 573; Hastings v. Stetson, 130 Mass. 76; Chesley v. Tompson, 137 Mass. 136; Austin v. Wilson, 4 Cush. 273; Stallings v. Whittaker, 55 Ark. 494, 18 S. W. 829; Republican Pub. Co. v. Mosman, 15 Colo. 399, 24 Pac. 1051; Swift v. Dickerman, 31 Conn. 285; Marble v. Chapin, 132 Mass. 225; McDougald v. Coward, 95 N. C. 368; Scripps v. Reilly, 38 Mich. 10; Newman v. Stein, 75 Mich. 402, 42 N. W. 956; Rea v. Harrington, 58 Vt. 181, 2 Atl. 475; McQueen v. Fulgham, 27 Tex. 463; Zeliff v. Jennings, 61 Tex. 458; Adams v. Smith, 58 Ill. 419; Miller v. Roy, 10 La. Ann. 231; Dufort v. Abadie, 23 La. Ann. 280; Blumhardt v. Rohr, 70 Md. 328, 17 Atl. 266; Johnson v. Robertson, 8 Part. (Ala.) 486. Contra, Prime v. Eastwood, 45 Iowa, 640. Such damages being compensatory, and not exemplary, malice is immaterial. Warner v. Publishing Co., 132 N. Y. 181, 30 N. E. 393; Farrand v. Aldrich, 85 Mich. 593, 48 N. W. 628; Detroit Daily Post Co. v. McArthur, 16 Mich. 447.

SEDUCTION AND CRIMINAL CONVERSATION. In actions by a parent for seduction of his daughter, or by a husband for criminal conversation with his wife, the fiction of loss of service supports the action, but damages may be given for the mental suffering of the parent or husband. Irwin v. Dearman, 11 East, 23; Bedford v. McKowl, 3 Esp. 119; Andrews v. Askey, 8 Car. & P. 7; Barbour v. Stephenson, 32 Fed. 66; Johnston v. Disbrow, 47 Mich. 59, 10 N. W. 79; Russell v. Chambers, 31 Minn. 54, 16 N. W. 458; Fox v. Stevens, 13 Minn. 272 (Gil. 252); Herring v. Jester, 27 Houst. 66; Emery v. Gowen, 4 Me. 33; Lunt v. Philbrick, 59 N. H. 59; Phillips v. Hoyle, 4 Gray, 568; Hatch v. Fuller, 131 Mass. 574; Rollins v. Chalmers, 51 Vt. 592; Hornketh v. Barr, 8 Serg. & R.

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[219] Lynch v. Knight, 9 H. L. Cas. 577; Trigg v. Railway Co., 74 Mo. 147; Burnett v. Telegraph Co., 39 Mo. App. 599; W. U. Tel. Co. v. Rogers, 68 Miss. 748, 9 South. 823; Summerfield v. Telegraph Co., 87 Wis. 1, 57 N. W. 973. A wife may recover for mental anguish, mortification, and injured feelings caused by the alienation of her husband's affections, without showing actual loss of support. Rice v. Rice (Mich.) 62 N. W. 833.

caused thereby may be included in the damages recoverable. The plaintiff, being entitled to some damage by reason of defendant's wrongful act, may recover all the damage arising from it.[220] Thus,

36; Phelin v. Kenderdine, 20 Pa. St. 354; Matheis v. Mazet, 164 Pa. St. 580, 30 Atl. 434; Kendrick v. McCrary, 11 Ga. 603; Felkner v. Scarlet, 29 Md. 154, Taylor v. Shelkett, 66 Ind. 297; Pruitt v. Cox, 21 Md. 15; Clem v. Holmes, 33 Grat. 722; Riddle v. McGinnis, 22 W. Va. 253; Wilhoit v. Hancock, 5 Bush, 567; Leucker v. Steilen, 89 Ill. 545; Grable v. Margrave, 4 Ill. 372; Ball v. Bruce, 21 Ill. 161; White v. Murtland, 71 Ill. 250; Yundt v. Hartrunft, 41 Ill. 9; Parker v. Monteith, 7 Or. 277; Ellington v. Ellington, 47 Miss. 329; Stevenson v. Belknap, 6 Iowa, 97; Morgan v. Ross, 74 Mo. 318; Comer v. Taylor, 82 Mo. 341; Stout v. Prall, 1 N. J. Law, 79; Coon v. Moffitt, 3 N. J. Law, 169; Lavery v. Crooke, 52 Wis. 612, 9 N. W. 599; Lipe v. Eisenlerd, 32 N. Y. 229; Clark v. Fitch, 2 Wend. 459; Stiles v. Tilford, 10 Wend. 338; 2 Selw. N. P. 1106; Russell v. Chambers, 31 Minn. 54, 16 N. W. 458; Bigaouette v. Paulet, 134 Mass. 123. In an action for criminal conversation, plaintiff need not show that he suffered any pecuniary damages through the loss of his wife's services. Long v. Booe (Ala.) 17 South. 716. For instruction as to damages in action for seduction of wife, see Matheis v. Mazet, 164 Pa. St. 580, 30 Atl. 434. Under statutes giving a woman a right of action for her own seduction, she may recover for mental anguish. Gray v. Bean, 27 Iowa, 221; Hawn v. Banghart, 76 Iowa, 683, 39 N. W. 251; Simons v. Busby, 119 Ind. 13, 21 N. E. 451; McCoy v. Trucks, 121 Ind. 292, 23 N. E. 93; Wilson v. Slepler, 86 Ind. 275; Breon v. Henkle, 14 Or. 494, 500, 13 Pac. 289.

ABDUCTION OF CHILDREN. Damages for mental anguish may be given in an action for the abduction of a child. Magee v. Holland, 27 N. J. Law, 86; Stowe v. Heywood, 7 Allen, 118.

PROSPECTIVE MENTAL SUFFERING. Damages may be recovered for prospective mental suffering. Matteson v. Railroad Co., 62 Barb. 364; Memphis & C. R. Co. v. Whitfield, 44 Miss. 466; South & North Alabama R. Co. v. McLendon, 63 Ala. 266; Campbell v. Car Co., 42 Fed. 484; Stewart v. City of Ripon, 38 Wis. 584; Spicer v. Railroad Co., 29 Wis. 580; Shiel v. City of Appleton, 49 Wis. 125, 5 N. W. 27; Kendall v. City of Albia, 73 Iowa, 241, 34 N. W. 833. In personal injury cases, damages may be recovered for grief and mortification which will be caused in the future by any serious deformity and disfigurement. Heddles v. Railroad Co., 77 Wis. 228, 46 N. W. 115; Power v. Harlow, 57 Mich. 107, 23 N. W. 606; Western & A. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912; Sherwood v. Railroad Co., 82 Mich. 374, 46 N. W. 773; Schmitz v. Railroad Co., 119 Mo. 256, 24 S. W. 472. Contra, Chicago, B. & Q. R. Co. v. Hines, 45 Ill. App. 299; Chicago, R. I. & P. R. Co. v. Caulfield, 11 C. C. A. 552, 63 Fed. 396. Damages for dread of hydrophobia may be recovered by one who has been bitten by a dog. Godeau v. Blood, 52 Vt. 251; Warner v. Chamberlain, 7 Houst. 18, 30 Atl. 638.

220 Chapman v. Telegraph Co. (Ky.) 13 S. W. 880.

in cases of assault [221] or false imprisonment,[222] where plaintiff was not actually touched, substantial damages may be recovered, though the entire injury suffered is necessarily mental. At common law there was no property in a corpse; and therefore compensation could not be recovered for mental suffering caused by indignities offered to the remains of a near relative.[223] But where defendant trespassed on plaintiff's burial lot, and disturbed the remains of his child, it was held that damages for mental suffering could be recovered in an action of quare clausum fregit,[224] because the trespass was sufficient to support the action. Compensation for mental suffering is often refused because such suffering is not a proximate result of the injury. Thus, where a personal injury causes a miscarriage, damages for mental suffering attending the miscarriage may be recovered, but grief for the loss of the child is too remote.[225] "Any mental anguish which may not have been connected with the bodily injury, but caused by some conception arising from a different source," is too remote. It may be stated as a general rule, in actions of tort, that, wherever a wrong is committed which will support an action to recover some damages, compensation for mental suffering may also be recovered, if such suffering follows as a natural and proximate result.

[221] I. de S. v. W. de S., Ames, Cas. Torts, 1; Morton v. Shoppee, 3 Car. & P. 373; Goddard v. Railway Co., 57 Me. 202; Handy v. Johnson, 5 Md. 450; Beach v. Hancock, 27 N. H. 223; Alexander v. Blodgett, 44 Vt. 476.

[222] Wood v. Lane, 6 Car. & P. 774; Peters v. Stanway, 6 Car. & P. 737; Grainger v. Hill, 4 Bing. N. C. 212; Fotheringham v. Express Co., 36 Fed. 252; Courtoy v. Dozier, 20 Ga. 369; Hawk v. Ridgway, 33 Ill. 473; Gold v. Bissell, 1 Wend. 210; Mead v. Young, 2 Dev. & B. 521.

[223] 2 Bl. Comm. 429; Foster v. Dodd, 8 Best & S. 842; Pierce v. Proprietors of Swan Point Cemetery, 10 R. I. 227.

[224] Meagher v. Driscoll, 99 Mass. 281. In Larson v. Chase, 47 Minn. 307, 50 N. W. 238, the court broke away from the common-law doctrine, and held that damages for mental suffering caused by the mutilation of human remains could be recovered, regardless of whether a trespass had been committed or not. See, also, Hale v. Bonner, 82 Tex. 33, 17 S. W. 605.

[225] Boyce v. Town of Danville, 53 Vt. 183; W. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598; City of Chicago v. McLean, 133 Ill. 148, 24 N. E. 527; Tunnicliffe v. Railroad Co. (Mich.) 61 N. W. 11.

Mental Suffering in Actions of Contract.

Upon the question as to whether damages are recoverable for mental suffering resulting from a breach of contract, the authorities are in conflict; but it is believed that, on principle, such damages are recoverable, subject to the general limitation that damages for the breach of a contract must be proximate, certain, and contemplated at the time the contract was made. Undoubtedly, the great majority of contracts are made solely to secure something having a definite or recognized pecuniary value; and in such cases mental suffering would be excluded as an element of damage, because not a natural or contemplated consequence of a breach.[228] But not all contracts are made for pecuniary benefits; and, "where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied to the ascertainment of damages flowing from the breach."[229] Thus, the breach of a promise of marriage has always been regarded as an exception, and damages for mental suffering allowed.[230] For breach of an undertaker's con-

[228] In the following cases mental suffering has been held too remote or unexpected to be compensated. Beasley v. Telegraph Co., 39 Md. 181; W. U. Tel. Co. v. Wingate, 6 Tex. Civ. App. 394, 25 S. W. 439; Same v. Stephens, 2 Tex. Civ. App. 129, 21 S. W. 148; Gulf, C. & S. F. R. Co. v. Hurley, 74 Tex. 593, 12 S. W. 226; W. U. Tel. Co. v. Linn (Tex. Civ. App.) 23 S. W. 895; Id., 87 Tex. 7, 26 S. W. 490; Same v. Motley (Tex. Sup.) 27 S. W. 52; Same v. Stone (Tex. Civ. App.) 27 S. W. 144; Same v. Andrews, 75 Tex. 305, 14 S. W. 641; Wells, Fargo & Co. Exp. v. Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412; Nichols v. Eddy (Tex. Civ. App.) 24 S. W. 316; W. U. Tel. Co. v. Carter, 85 Tex. 580, 22 S. W. 961; Ikard v. Telegraph Co. (Tex. Civ. App.) 22 S. W. 534; Pullman Palace Car Co. v. Fowler, 27 S. W. 268; Pullman Co. v. McDonald, 2 Tex. Civ. App. 322, 21 S. W. 945; Thompson v. Telegraph Co., 107 N. C. 449, 12 S. E. 427. In an action against an express company for failure to deliver promptly medicines shipped for the use of plaintiff's sick wife, damages for sympathetic mental suffering of the husband on account of the pain of his wife are too remote. Pacific Exp. Co. v. Black (Tex. Civ. App.) 24 S. W. 830.

[229] Wadsworth v. Telegraph Co., 86 Tenn. 695, 703, 8 S. W. 574.

[230] Collins v. Mack, 31 Ark. 684; Sherman v. Dawson, 102 Mass. 395, 399; Reed v. Clark, 47 Cal. 194; Sauer v. Schulenberg, 33 Md. 288; Wilds v. Bogan, 57 Ind. 453; Baldy v. Stratton, 11 Pa. St. 316; Chesley v. Chesley, 10 N. H. 327; Wilbur v. Johnson, 58 Mo. 600; Bird v. Thompson, 96 Mo. 424, 9 S. W. 788; Tobin v. Shaw, 45 Me. 331; Johnson v. Jenkins, 24 N. Y. 252; Musselman v. Barker, 26 Neb. 737, 42 N. W. 759; Thorn v. Knapp, 42 N. Y. 474; Kurtz v. Frank, 76 Ind. 594; Harrison v. Swift, 13 Allen, 144; Giese v. Schultz, 53 Wis.

tract to keep safely the body of plaintiff's deceased child, it was held that damages could be recovered for mental anguish;[231] and a wife has been allowed to recover for mental suffering caused by the negligence of a railroad company in delaying her husband's corpse.[232]

Actions against telegraph companies for delay or failure to deliver messages constitute by far the most numerous class of cases in which this question has been raised. In the case of So Relle v. Telegraph Co.[233] it was held that the addressee of a telegraphic message could recover, as compensatory damages, for the failure to deliver promptly a message announcing the death of his mother, by reason of which delay he was prevented from attending her funeral. And it is now well established in Texas that, where the nature of the message is such as to apprise the company that mental suffering will result from delay or failure to transmit it, compensation for such suffering can be recovered though not connected with any physical injury or pecuniary loss.[234] The "Texas" doctrine has been

462, 10 N. W. 598; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936.

231 Renihan v. Wright, 125 Ind. 536, 25 N. E. 822.

232 Hale v. Bonner, 82 Tex. 33, 17 S. W. 605.

233 55 Tex. 308.

234 Laper v. Telegraph Co., 70 Tex. 689, 8 S. W. 600; W. U. Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734; Same v. Rosentreter, 80 Tex. 406, 16 S. W. 25; Stuart v. Telegraph Co., 66 Tex. 580, 18 S. W. 351; W. U. Tel. Co. v. Nations, 82 Tex. 539, 18 S. W. 709; Same v. Beringer, 84 Tex. 38, 19 S. W. 336; Same v. Erwin (Tex. Sup.) 19 S. W. 1002; Same v. Evans, 1 Tex. Civ. App. 297, 21 S. W. 266; Same v. Johnson (Tex. Civ. App.) 28 S. W. 124; Same v. May (Tex. Civ. App.) 27 S. W. 760; Same v. De Jarles, Id. 792. Compensation for mental suffering may be recovered for breach of a contract to transmit money by telegraph where defendant had notice of the importance of prompt performance. W. U. Tel. Co. v. Simpson, 73 Tex. 422, 11 S. W. 385. As to what is sufficient to charge the company with notice that mental suffering will result from failure to promptly deliver the message, see W. U. Tel. Co. v. Brown, 71 Tex. 723, 10 S. W. 323, overruled in Same v. Carter, 85 Tex. 580, 22 S. W. 961; Same v. Moore, 76 Tex. 66, 12 S. W. 949; Same v. Adams, 75 Tex. 531, 12 S. W. 857; Same v. Feegles, 75 Tex. 537, 12 S. W. 860; Same v. Kirkpatrick, 76 Tex. 27, 13 S. W. 70; Potts v. Telegraph Co., 82 Tex. 545, 18 S. W. 604; W. U. Tel. Co. v. Ward (Tex. App.) 19 S. W. 898; Same v. Carter, 2 Tex. Civ. App. 624, 21 S. W. 688; Id., 85 Tex. 580, 22 S. W. 961; Reese v. Telegraph Co., 123 Ind. 291, 24 N. E. 163.

adopted and followed in other states; among them, Alabama, Kentucky, Indiana, Iowa, North Carolina, and Tennessee.[235] But many states, on the other hand, have repudiated it;[236] and the federal courts have refused to follow it.[237] When it is once conceded that an allowance for mental suffering is proper in any case, it is difficult to see what there is in the nature of a contract to prevent an allowance for such sufferings, where they are a proximate and contemplated consequence of a breach. Even a technical breach of contract, whether followed by damage or not, will support an action. The party is entitled to nominal damages, at least. This being so, it follows, as in cases of torts, that the entire damage, including compensation for mental suffering, may be recovered. If damages for mental suffering in cases of tort were confined to cases where mental suffering is an element or necessary consequence of physical pain, there would be some reason in denying such damages in an action of contract. But, so long as mental suffering is considered a proper element of damage in actions for injuries to property or reputation, no sound reason can be given for denying a recovery of such damages in actions of contract.[238]

[235] W. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419; Same v. Cunningham, 99 Ala. 314, 14 South. 579; Chapman v. Telegraph Co., 90 Ky. 265, 13 S. W. 880; Reese v. Telegraph Co., 123 Ind. 294, 24 N. E. 163; W. U. Tel. Co. v. Newhouse, 6 Ind. App. 422, 33 N. E. 800; Same v. Cline, 8 Ind. App. 364, 35 N. E. 564; Mentzer v. Telegraph Co. (Iowa) 62 N. W. 1; Thompson v. Telegraph Co., 107 N. C. 449, 12 S. E. 427; Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. 574.

[236] W. U. Tel. Co. v. Rogers, 68 Miss. 748, 9 South. 823; Russell v. Telegraph Co., 3 Dak. 315, 19 N. W. 408; Connell v. Telegraph Co., 116 Mo. 34, 22 S. W. 345; Newman v. Telegraph Co., 54 Mo. App. 434; Kester v. Telegraph Co., 8 Ohio Cir. Ct. R. 236; Summerfield v. Telegraph Co., 87 Wis. 1, 57 N. W. 973; West v. Telegraph Co., 39 Kan. 93, 17 Pac. 807; Chapman v. Telegraph Co., 88 Ga. 763, 15 S. E. 901; Francis v. Same, 58 Minn. 252, 59 N. W. 1078; International Ocean Tel. Co. v. Saunders, 32 Fla. 434, 14 South. 148.

[237] Chase v. Telegraph Co., 44 Fed. 554; Crawson v. Telegraph Co., 47 Fed. 544; Tyler v. Telegraph Co., 54 Fed. 634; Kester v. Same, 55 Fed. 603; W. U. Tel. Co. v. Wood, 6 C. C. A. 432, 57 Fed. 471; Gahan v. Telegraph Co., 59 Fed. 433. But see Beasley v. Telegraph Co., 39 Fed. 181.

[238] See note by Wm. L. Clark, Jr., in W. U. Tel. Co. v. Coggin, 15 C. C. A. 235: "Damages in Actions against Telegraph Companies." See, also, Lynch v. Knight, 9 H. L. Cas. 577, per Lord Wensleydale.

Kinds of Mental Injury Compensated.

Mental suffering which is merely sentimental cannot be compensated. "For mere inconveniences, such as annoyance, loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages. That is purely sentimental."[239] Compensation may be recovered, in proper cases, for loss of mental capacity;[240] mental suffering, accompanying physical pain;[241] mental anxiety and distress;[242] fright caused by apprehension of physical harm;[243] loss of peace of mind and happiness;[244] sense of indignity, insult, mortification, or wounded pride;[245] sense of shame and humiliation;[246] or a blow to the affections.[247]

[239] Hobbs v. Railway Co., L. R. 10 Q. B. 111. See, also, Walsh v. Railway Co., 42 Wis. 23; McAllen v. Telegraph Co., 70 Tex. 243, 7 S. W. 715. "The plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach." Hamlin v. Railway Co., 1 Hurl. & N. 408, 411.

[240] Ballou v. Farnum, 11 Allen, 73; Wallace v. Railroad Co., 104 N. C. 442, 10 S. E. 552.

[241] Boyle v. Case, 9 Sawy. 386, 389, 18 Fed. 880; Carpenter v. Railroad Co., 39 Fed. 315; South & N. A. R. Co. v. McLendon, 63 Ala. 266; Fairchild v. Stage Co., 13 Cal. 599; Malone v. Hawley, 46 Cal. 409; Pierce v. Millay, 44 Ill. 189; Indianapolis & St. L. R. Co. v. Stables, 62 Ill. 313; Sorgenfrei v. Schroeder, 75 Ill. 397; Hannibal & St. J. R. Co. v. Martin, 111 Ill. 219; Village of Sheridan v. Hibbard, 119 Ill. 307, 9 N. E. 901; Muldowney v. Railway Co., 36 Iowa, 462; McKinley v. Railroad Co., 44 Iowa, 314; Kendall v. City of Albia, 73 Iowa, 241, 34 N. W. 833; Tyler v. Pomeroy, 8 Allen, 480; Smith v. Holcomb, 99 Mass. 552; West v. Forrest, 22 Mo. 344; Matteson v. Railroad Co., 62 Barb. 364; Wallace v. Railroad Co., 104 N. C. 442, 10 S. E. 552; Pennsylvania & O. Canal Co. v. Graham, 63 Pa. St. 290; Scott Tp. v. Montgomery, 95 Pa. St. 444; Goodno v. City of Oshkosh, 28 Wis. 300; Stewart v. City of Ripon, 38 Wis. 584.

[242] See, generally, cases cited in notes supra; also, Godeau v. Blood, 52 Vt. 251; W. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598.

[243] Louisville & N. R. Co. v. Whitman, 79 Ala. 328; Stutz v. Railway Co., 73 Wis. 147, 40 N. W. 653. See, also, Kendall v. City of Albia, 73 Iowa, 241, 34 N. W. 833, and cases cited in note 218, supra.

[244] Cox v. Vanderkleed, 21 Ind. 161.

[245] See note 245 on following page.

[246] See note 246 on following page.

[247] See note 247 on following page.

Damages for Mental Suffering Compensatory, not Exemplary.

Damages for mental suffering, when allowed at all, are purely compensatory, not exemplary, vindictive, or punitive. They are designed to indemnify plaintiff for an injury suffered, not to punish defendant for a wrong done. Consequently, the motives of defendant, and the presense or absence of fraud, malice, gross negligence, or oppression, are immaterial.[248] Thus, it was held in an action for libel that plaintiff was entitled to damages for mental suffering, though the jury had acquitted defendants of malice.[249] Exemplary damages are given in some cases where mental suffering is not

[245] Quigley v. Railroad Co., 5 Sawy. 107; Louisville & N. R. Co. v. Whitman, 79 Ala. 328; Chicago & A. R. Co. v. Flagg, 43 Ill. 364; Chicago & N. W. Ry. Co. v. Williams, 55 Ill. 185; Adams v. Smith, 418; Chicago & N. W. Ry. Co. v. Chisholm, 79 Ill. 584; Pennsylvania R. Co. v. Connell, 112 Ill. 295; Lake Erie & W. Ry. Co. v. Fix, 88 Ind. 381; Shepard v. Railway Co., 77 Iowa, 54, 41 N. W. 564; Smith v. Railway Co., 23 Ohio St. 10; Stutz v. Railway Co., 73 Wis. 147, 40 N. W. 653; Paine v. Railroad Co., 45 Iowa, 569; Fitzgerald v. Railroad Co., 50 Iowa, 79; Batterson v. Railway, 49 Mich. 184, 13 N. W. 508; Chicago & A. R. Co. v. Flagg, 43 Ill. 364; Carsten v. Railroad Co., 44 Minn. 454, 47 N. W. 49; Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. 864; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695; Morgan v. Curley, 142 Mass. 107, 7 N. E. 726; Hastings v. Stetson, 130 Mass. 76; Mahoney v. Belford, 132 Mass. 393; Chesley v. Tompson, 137 Mass. 136; Scripps v. Reilly, 38 Mich. 10; Newman v. Stein, 75 Mich. 402, 42 N. W. 956; Barnes v. Campbell, 60 N. H. 27.

[246] As in action for seduction, see Barbour v. Stephenson, 32 Fed. 66; Hatch v. Fuller, 131 Mass. 574; Russell v. Chambers, 31 Minn. 54, 16 N. W. 458; Lunt v. Philbrick, 59 N. H. 59; Riddle v. McGinnis, 22 W. Va. 253; Simons v. Busby, 119 Ind. 13, 21 N. E. 451; Breon v. Henkle, 14 Or. 494, 500, 13 Pac. 289; Giese v. Schultz, 53 Wis. 462, 10 N. W. 598; Id., 65 Wis. 487, 27 N. W. 353; or for indecent assault, see Campbell v. Car Co., 42 Fed. 484; Wolf v. Trinkle, 103 Ind. 355, 3 N. E. 110; Fay v. Swan, 44 Mich. 544, 7 N. W. 215; Ford v. Jones, 62 Barb. 484; or for the wrongful execution of a search warrant, Melcher v. Scruggs, 72 Mo. 407.

[247] As in actions for breach of promise of marriage, or for grief caused by the failure to deliver a telegram.

[248] Smith v. Overby, 30 Ga. 241; W. U. Tel. Co. v. Berdine, 2 Tex. Civ. App. 517, 21 S. W. 982; Dirmeyer v. O'Hern, 39 La. Ann. 961, 3 South. 132; American Water-Works Co. v. Dougherty, 37 Neb. 373, 55 N. W. 1051; Bixby v. Dunlap, 56 N. H. 456; Thomp. Electr. § 382. Though exemplary damages cannot be recovered against a principal for the act of his agent, damages for mental suffering may. Craker v. Railway Co., 36 Wis. 657.

[249] Ferrand v. Aldrich, 85 Mich. 593, 48 N. W. 628. And see Detroit Daily

shown to have resulted from the act complained of; and often, after a full allowance has been made for mental suffering, the circumstances of the case have been held to be such as to justify a further award by way of punishment or example.[250]

AGGRAVATION AND MITIGATION OF DAMAGES.

41. Where damages are not capable of exact pecuniary measurement, but must be left to the discretion of a jury, evidence of the circumstances of the wrong addressed to the jury for the purpose of influencing its estimate is said to be in aggravation or mitigation of damages.

The terms "aggravation" and "mitigation" of damages are properly used only where the damages are incapable of exact pecuniary measurement. Indemnity is the aim of the law. Where the exact loss is definitely known, the damages cannot be mitigated to less than full and complete compensation; nor can they be aggravated to more than that amount, unless the circumstances justify the imposition of exemplary damages. In other words, evidence in aggravation or mitigation of damages is admissible only when the jury is called upon to assess exemplary damages, or to estimate damages for nonpecuniary injuries, such as physical and mental suffering. For example, provocation is admissible, in an action for assault,[251] to mitigate exemplary damages or damages for mental suffering. Ordinarily, evidence in aggravation or mitigation of damages is inadmissible in actions of contract. These terms are sometimes loosely used to mean evidence of anything that tends to increase or decrease the damages, but the proper sense is that indicated above.

Post Co. v. McArthur, 16 Mich. 447. Warner v. Publishing Co., 132 N. Y. 181, 30 N. E. 393.

250 See post, "Exemplary Damages."

251 Smith v. Holcomb, 99 Mass. 552. See, also, Currier v. Swan, 63 Me. 323. Provocation cannot mitigate actual damages for assault and battery. Goldsmith's Adm'r v. Joy, 61 Vt. 488, 17 Atl. 1010. It is proper to charge that the value and influence of an example set by awarding exemplary damages for assault and battery depend upon the social standing of the parties, and that the jury may consider that circumstance in determining the amount. Id.

It is for the jury to say whether the matters given in evidence aggravate or mitigate the damages. It is not a question of law for the court. Therefore, the court should not charge that certain matters must be taken in mitigation of damages, and certain other matters in aggravation.* However, as there would ordinarily be no doubt as to the effect of the evidence, such an instruction would probably be harmless error. For example, in an action for slander it would not ordinarily be reversible error to charge that plaintiff's high character and social condition should be considered in aggravation of damages, for the injury to such a one would ordinarily be greater than the one who had no character to lose. Nevertheless, it has been said that, if plaintiff has a well-established character, there is less likelihood of slander hurting him, whereas, if he was a new man starting in the effort to build up a reputation, the same slander might cause more harm. In such a case, therefore, plaintiff's established character may be considered by the jury in mitigation of damages.[252] "The question, in short, is one as to the admissibility and effect of evidence, and not strictly one as to the legal measure of damages. Nevertheless, certain rules as to the effect of some common circumstances (such as provocation, good faith, the position of the parties, etc.) in aggravating or mitigating the damages have been laid down, and are followed in ordinary cases, though, as has been said, they should not be regarded as conclusive. These rules are applied in actions of breach of promise of marriage and of tort for personal injury, and in all actions where exemplary damages are allowed."[253]

*It is for the jury to say whether they will consider seduction as an aggravation of damages in actions for breach of promise of marriage, and it is error to instruct them that they must consider it. Osmun v. Winters, 25 Or. 260, 35 Pac. 250.

252 Broughton v. McGrew, 39 Fed. 672.

253 Sedg. Dam. § 52. See, generally, as to aggravation and mitigation of damages, Grable v. Margrave, 3 Scam. 372 (seduction, evidence of defendant's pecuniary ability); Storey v. Early, 86 Ill. 461 (libel, defendant's pecuniary ability); Sayre v. Sayre, 25 N. J. Law, 235 (slander, evidence of plaintiff's general bad character); Duval v. Davey, 32 Ohio St. 604 (slander for charging woman with unchastity, evidence of reputation for chastity); Mahoney v. Belford, 132 Mass. 393 (slander, evidence of reputation); Palmer v. Crook, 7 Gray, 418 (crim. con., previous state of wife's feeling towards husband). In

Assault and Battery.

The current language of the cases is that leave and license [254] and provocation [255] are in mitigation of damages. It would seem, however, more accurate to say that no facts and circumstances can be given in mitigation of actual damages, unless they furnish a legal justification, and are therefore a defense to the cause of action.[256] It is insisted that provocative words cannot be given in mitigation of actual or compensatory damages, but only upon the question of punitive damages.[257]

False Imprisonment.

One who has been wrongfully restrained of liberty of locomotion may recover not only compensatory damages, but wanton disregard of legal right will entitle him to punitive damages, as in an action by a young girl for humiliation, insult, and wounded sensibility consequent upon her arrest.[258] While malice or want of proper

an action by a wife for the alienation of her husband's affections, the rank and condition of defendant cannot be considered, in assessing damages. Bailey v. Bailey (Iowa) 63 N. W. 341. In an action by a husband for the loss of his wife's services and society through defendant's negligence, evidence of disturbed marital relations, when restricted to mitigation of damages, is not reversible error. Sullivan v. Railway Co., 162 Mass. 536, 39 N. E. 185.

[254] Fredericksen v. Manufacturing Co., 38 Minn. 356, 37 N. W. 453.

[255] Fraser v. Berkeley, 7 Car. & P. 621; Avery v. Ray, 1 Mass. 12; Kiff v. Youmans, 86 N. Y. 324; Burke v. Melvin, 45 Conn. 243. But not after cooling time. Thrall v. Knapp, 17 Iowa, 468; Goldsmith's Adm'r v. Joy, 61 Vt. 488, 17 Atl. 1010; Bonino v. Caledonio, 144 Mass. 299, 11 N. E. 98; Prindle v. Haight, 83 Wis. 50, 52 N. W. 1134.

[256] Birchard v. Booth, 4 Wis. 67, 76. And see Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468; Robison v. Rupert, 23 Pa. St. 523; Jacobs v. Hoover, 9 Minn. 204 (Gil. 189); Watson v. Christie, 2 Bos. & P. 224; Dresser v. Blair, 28 Mich. 501; Brown v. Swineford, 44 Wis 282; Prentiss v. Shaw, 56 Me. 427; Voltz v. Blackmar, 64 N. Y. 440.

[257] Goldsmith's Adm'r v. Joy, 61 Vt. 488, 17 Atl. 1010. And see Caspar v. Prosdame, 46 La. Ann. 36, 14 South. 317; Crosby v. Humphreys, 59 Minn. 92, 60 N. W. 843.

[258] Ball v. Horrigan, 65 Hun, 621, 19 N. Y. Supp. 913; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695; Pearce v. Needham, 37 Ill. App. 90; Taylor v. Coolidge, 64 Vt. 506, 24 Atl. 656; Hewlett v. George, 68 Miss. 703, 9 South. 885. A verdict for $2,917 damages has been set aside as excessive for three hours' detention in a lockup. Woodward v. Glidden 33 Minn. 108, 22 N. W. 127. And a verdict of 6 cents for detention long enough to walk across the

cause is no part of the plaintiff's case in an action for false imprisonment, proof that the defendant believed himself to be legally right in making an improper arrest will mitigate exemplary damages, but will not diminish actual damages.[259] But compensatory damages are not necessarily limited to actual money losses. For an unlawful incarceration in an insane asylum one may recover, not only money expended in procuring his release, but also for consequent humiliation, shame, disgrace, and injury to reputation.[260]

Libel and Slander.

On the same principle that whatever tends to prove malice in defamation aggravates the wrong, and entitles the plaintiff to exemplary damages,[261] whatever negatives malice operates to mitigate damages. The jury determines whether given matter is in mitigation or aggravation of damages.

Same—Provocation.

Provocation may mitigate damages.[262] The law makes allowance for acts committed in the heat of sudden passion by way of mitigation of damages. But if there had been an opportunity for blood to cool, a mere provocation, connected with wrong complained of, cannot be shown.[263] The defense follows the analogy of provoca-

street has been sustained as adequate. Henderson v. McReynolds, 60 Hun. 579, 14 N. Y. Supp. 351. And see Cabell v. Arnold (Tex. Civ. App.) 22 S. W. 62; Wiley v. Keokuk, 6 Kan. 94.

259 Holmes v. Blyler, 80 Iowa, 365, 45 N. W. 756; Livingston v. Burroughs, 33 Mich. 511; Tenney v. Smith, 63 Vt. 520, 22 Atl. 659; Comer v. Knowles, 17 Kan. 436; Sleight v. Ogle, 4 E. D. Smith, 445; Miller v. Grice, 2 Rich. 27; McDaniel v. Needham, 61 Tex. 269; Rogers v. Wilson, Minor (Ala.) 407; Hill v. Taylor, 50 Mich. 549, 15 N. W. 899; Roth v. Smith, 41 Ill. 314. Good faith as a justification. Aldrich v. Weeks, 62 Vt. 89, 19 Atl. 115. Provocation no justification. Grace v. Dempsey, 75 Wis. 313, 43 N. W. 1127. Nor bad character of defendant. Hurlehy v. Martine, 56 Hun, 648, 10 N. Y. Supp. 92.

260 Such damages, not being punitive, may be recovered after death of defendant. Hewlett v. George, 68 Miss. 703, 9 South. 885.

261 See post, 207. See, also, Hayes v. Todd, 34 Fla. 233, 15 South. 752; Cruikshank v. Gordon, 118 N. Y. 178, 23 N. E. 457; Grace v. McArthur, 76 Wis. 641, 45 N. W. 518; Callahan v. Ingram, 122 Mo. 355, 26 S. W. 1020.

262 Tarpley v. Blabey, 2 Bing. N. C. 437.

263 Quinby v. Tribune Co., 38 Minn. 528, 38 N. W. 623; Stewart v. Tribune Co., 41 Minn. 71, 42 N. W. 787.

tion as mitigating damages in assault and battery, but there does not seem to be any doctrine akin to contributory negligence, whereby the wrong is barred if the person defamed in some manner induced the publication.[264]

Same—Common-Law Retraction.

A mere offer to retract cannot be shown in mitigation of damages, but a retraction published in good faith, even after commencement of an action for defamation, may, under some circumstances, be proved in mitigation of damages,[265] but in mitigation only,* because it negatives malice.[266] Conversely, evidence that the defamer, subsequent to the publication of the article sued on, has published another, containing a letter from the defamed requesting a retraction, is admissible to show malice.[267]

Same—Honest Belief—Rumors.

The law recognizes that anything tending to show an honest belief in the substance of the publication when made is admissible for the purpose of disproving malice and mitigating damages, though it tends to prove the truth of the charge.[268] Accordingly, in an action for slander, evidence that the slander was only a repetition of a current report of long standing, by which plaintiff's general reputation has become impaired, is admissible in mitigation of damages.[269] And where the article contained several distinct libelous charges, a justification as to part of the charges, and not the whole, goes only in mitigation of damages, and does not warrant a verdict for the defendant.[270] Therefore, partial truth may mitigate damages.[271] But good faith and reasonable belief will not prevent re-

[264] Vallery v. State, 42 Neb. 123, 60 N. W. 347.

[265] Turton v. Recorder Co., 144 N. Y. 144, 38 N. E. 1009; Davis v. Marxhausen, 103 Mich. 315, 61 N. W. 504; Storey v. Wallace, 60 Ill. 51.

* Davis v. Marxhausen, 103 Mich. 315, 61 N. W. 504.

[266] Allen v. Pioneer Press Co., 40 Minn. 117, 41 N. W. 936; Park v. Detroit Free-Press Co., 72 Mich. 560, 40 N. W. 731.

[267] Thibault v. Sessions, 101 Mich. 279, 59 N. W. 624.

[268] Huson v. Dale, 19 Mich. 17, 26.

[269] Nelson v. Wallace, 48 Mo. App. 193.

[270] Hay v. Reid, 85 Mich. 296, 48 N. W. 507.

[271] Sawyer v. Bennett (Sup.) 20 N. Y. Supp. 45.

covery of substantial damages.[272] Cases involving these general principles are constantly arising in connection with the defense urged by the defendant that his conduct was justified by rumors concerning the plaintiff.

So far as it may affect the culpability of the defendant, as mitigating damages, evidence that he knew, believed, and relied on[273] general rumors to the effect of the defamatory matter would be entirely proper. Hence, such evidence is often held to be admissible.[274] However, from the plaintiff's point of view, the extent of his suffering is not measured by defendant's moral shortcoming or personal righteousness. Hence, such evidence is perhaps as often disallowed.[275] If, however, a defendant offers to prove such rumors, he cannot object to similar evidence in rebuttal.[276] But publishing defamatory matter as a rumor,[277] or giving a specific source as authority, is no longer[278] a defense[279] by way of justification, although it may operate to mitigate damages.[280]

272 Burt v. Newspaper Co., 154 Mass. 238, 28 N. E. 1; Blocker v. Schoff, 83 Iowa, 265, 48 N. W. 1079.

273 Larrabee v. Tribune Co., 36 Minn. 141, 30 N. W. 462; Lothrop v. Adams, 133 Mass. 471. Truth of the charge, though not pleaded, is admissible to disprove malice, and in mitigation of damages, if it was known at the time of publication, but not otherwise. Simons v. Burnham, 102 Mich. 189, 60 N. W. 476; Quinn v. Scott, 22 Minn. 456.

274 Van Derveer v. Sutphin, 5 Ohio St. 293; Republican Pub. Co. v. Mosman, 15 Colo. 399, 24 Pac. 1051; Hay v. Reid, 85 Mich. 296, 48 N. W. 507; Morrison v. Publishing Co. (Super. N. Y.) 14 N. Y. Supp. 131; Arnold v. Jewett, 125 Mo. 241, 28 S. W. 614.

275 Scott v. Sampson, 8 Q. B. Div. 491; Edwards v. Society, 99 Cal. 431, 34 Pac. 128; Gray v. Elzroth, 10 Ind. App. 587, 37 N. E. 551; Blackwell v. Landreth, 90 Va. 748, 19 S. E. 791.

276 Bogk v. Gassert, 149 U. S. 17, 13 Sup. Ct. 738; Ward v. Manufacturing Co., 5 C. C. A. 538, 56 Fed. 437.

277 Haskins v. Lumsden, 10 Wis. 359; Republican Pub. Co. v. Miner, 3 Colo. App. 568, 34 Pac. 485.

278 Maitland v. Goldney, 2 East, 426; Northampton's Case, 12 Coke, 384.

279 Lewis v. Walter, 4 Barn. & Ald. 605; Tidman v. Ainslie, 10 Exch. 63; Watkin v. Hall, L. R. 3 Q. B. 396.

280 Dole v. Lyon, 10 Johns. 447.

Same—Plaintiff's Character and Position.

When one claims damages on the ground of the disparagement of his character, evidence in mitigation of damages may be given, under proper allegation,[281] that his character was blemished before the publication of the libel or slander.[282] Thus, in an action for libel, the defendant may prove, in mitigation of damages, that, before and at the time of the publication of the libel, the plaintiff was generally suspected to be guilty of the crime thereby imputed to him, and that, on account of this suspicion, his relatives and friends had ceased to associate with him.[283] Evidence of general bad reputation is admissible, in mitigation of damages; and evidence of bad reputation as to that phase of character involved in a case is competent, not to establish any facts in issue, but to explain conduct, and to enable the jury better to weigh the evidence upon doubtful questions of fact bearing on the character of defendant.[284] Therefore, bad reputation for integrity is admissible in charges of political dishonesty. "We should be loth to differentiate a want of integrity in political matters from the same failing in business or society." [285] The plaintiff's general social and personal standing may be shown in evidence as bearing on the question of damages.[286] And if plaintiff alleges her good character and repute, and this is denied by the defendant, the plaintiff is not required to rest upon the legal presumption as to chastity and virtue,[287] but she can properly offer proof under such allegation as part of her case.[288]

[281] Halley v. Gregg, 82 Iowa, 622, 48 N. W. 974; Ward v. Dean, 57 Hun, 585, 10 N. Y. Supp. 421.

[282] Ball, Cas. Torts, p. 122.

[283] Earl of Leicester v. Walter, 2 Camp. 251. Cf Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119.

[284] Hallam v. Post Pub. Co., 55 Fed. 456 See Thibault v. Sessions, 101 Mich. 279, 59 N. W. 624.

[285] Post Pub. Co. v. Hallam, 8 C. C. A. 201, 59 Fed. 530.

[286] Larned v. Bullinton, 3 Mass. 546; Klumph v. Dunn, 66 Pa. St. 141; Press Pub. Co. v. McDonald, 11 C. C. A. 155, 63 Fed. 238; Morey v. Association, 123 N. Y. 207, 25 N. E. 161; Farrand v. Aldrich, 85 Mich. 593, 48 N. W. 628; Hintz v. Graupner, 138 Ill. 158, 27 N. E. 935.

[287] Conroy v. Pittsburgh Times, 139 Pa. St. 334, 21 Atl. 154.

[288] Stafford v. Morning Journal Ass'n, 142 N. Y. 598, 37 N. E. 625; Young v. Johnson, 123 N. Y. 226, 25 N. E. 363.

REDUCTION OF LOSS.

42. An injured party cannot be compelled to accept specific reparation in lieu of damages; but, if he does so voluntarily, it will operate as a reduction of damages.

The right to recover damages is a species of property which vests absolutely in the injured party on the happening of the wrong.[289] It is a right to recover a money judgment, and nothing but the injured party's own act can release it.[290] He cannot be compelled to accept specific reparation in lieu of damages, for he has an absolute right to a money judgment.[291] Hence an offer by defendant to re-

[289] See ante, p. 2. Where plaintiff cured certain fruit for defendants, who disposed of it at values usually obtained for good fruit, that fact will not affect plaintiff's liability to defendants for damages to the fruit in defectively curing it. E. E. Thomas Fruit Co. v. Start, 107 Cal. 206, 40 Pac. 336.

[290] Ordinarily the fact that defendant applied the proceeds of his wrong to plaintiff's benefit will not reduce the damages, as plaintiff may refuse to accept such application. Torry v. Black, 58 N. Y. 185. The fact that defendant paid a note of plaintiff's with the proceeds of converted property will not reduce the damages. Northrup v. McGill, 27 Mich. 234. A sheriff who has wrongfully sold goods belonging to plaintiff cannot reduce the damages by showing that he paid a debt of the plaintiff out of the proceeds. Parham v. McMurray, 32 Ark. 261; Dallam v. Fitler, 6 Watts & S. 323; McMichael v. Mason, 13 Pa. St. 214. Where the injured party consents to the application, it will reduce the damages. Torry v. Black, supra. An unaccepted offer to return the goods cannot be shown, to mitigate the damages for conversion. Carpenter v. Dresser, 72 Me. 377. Where the application is authorized by law, the injured party cannot object, and damages will be reduced. Kaley v. Shed, 10 Metc. (Mass.) 317; Empire Mill Co. v. Lovell, 77 Iowa, 100, 41 N. W. 583; Ward v. Benson, 31 How. Prac. 411. In an action for conversion, defendant may show that the goods were seized and sold under an execution against plaintiff. Perkins v. Freeman, 26 Ill. 477; Bates v. Courtwright, 36 Ill. 518; Ball v. Liney, 48 N. Y. 6; Wehle v. Spelman, 25 Hun, 99; Lazarus v. Ely, 45 Conn. 504; Howard v. Mandertield, 31 Minn. 337, 17 N. W. 946; Beyersdorf v. Sump, 39 Minn. 495, 41 N. W. 101. Compare Lazarus v. Ely, 45 Conn. 504; Hopple v. Higbee, 23 N. J. Law, 342; Mayer v. Duke, 72 Tex. 445, 10 S. W. 565,—with Edmondson v. Nuttall, 34 Law J. C. P. 102, 104, 17 C. B. (N. S.) 280; Stickney v. Allen, 10 Gray, 352; Beyersdorf v. Sump, 39 Minn. 495, 41 N. W. 101; Ball v. Liney, 48 N. Y. 6; Wehle v. Butler, 61 N. Y. 245.

[291] In Fisher v. Prince, 3 Burrows, 1363, Lord Mansfield said: "Where trover

turn converted property will not reduce the damages if not accepted by the plaintiff.[292] The rule of avoidable consequences does not require the injured party to receive back converted property, nor to buy it back, though offered at less than the market price.[293] The rule has no application to losses already completely suffered. As to such losses, the right to pecuniary compensation is absolute. But if the reparation offered would prevent further loss, not at that time actually suffered, the rule applies, and the reparation must be accepted, as compensation for subsequent losses will be denied.

Reparation Preventing Actual Loss.

Where the reparation by defendant has actually prevented the happening of any damage in the first instance, from the injury, it may be shown, whether accepted by the plaintiff or not, as it goes to show the actual amount of damage, and plaintiff never had a right to recover anything more.[294] Thus, in an action for breach of a

is brought for a specific chattel, of an ascertained quantity and quality, and unattended by any circumstances that can enhance the damages above the real value, but that its real and ascertained value must be the sole measure of the damages, there the specific thing demanded may be brought into court. Where there is an uncertainty either as to the quantity or quality of the thing demanded, or that there is any tort accompanying it that may enhance the damages above the real value of the thing, and there is no rule whereby to estimate the additional value, then it shall not be brought in." See, also. Whitten v. Fuller, 2 W. Bl. 902; Earle v. Holderness, 4 Bing. 462; Tucker v. Wright, 3 Bing. 601; Gibson v. Humphrey, 1 Cromp. & M. 544. The practice of staying proceedings upon bringing property into court has never generally prevailed in this country, but it seems to be the practice in Vermont. Rutland & W. R. Co. v. Bank of Middlebury, 32 Vt. 639; Bucklin v. Beals, 38 Vt. 653. And see Stevens v. Low, 2 Hill, 132; Shotwell v. Wendover, 1 Johns. 65.

[292] Norman v. Rogers, 29 Ark. 365; Carpenter v. Dresser, 72 Me. 377; Stickney v. Allen, 10 Gray, 352; Bringard v. Stellwagen, 41 Mich. 54, 1 N. W. 909; Livermore v. Northrup, 44 N. Y. 107; Carpenter v. Insurance Co., 22 Hun, 47; Green v. Sperry, 16 Vt. 390; Morgan v. Kidder, 50 Vt. 367.

[293] Weld v. Reilly, 48 N. Y. Super. Ct. 531; Munson v. Munson, 24 Conn. 115; Woods v. McCall, 67 Ga. 506.

[294] Dow v. Humbert, 91 U. S. 294; Stollenwerck v. Thacher, 115 Mass. 224. In estimating the damages caused by the diversion of a stream, the fact that a part of the water diverted was returned to the stream above plaintiff's land must be considered. Manville Co. v. City of Worcester, 138 Mass. 89. Where a wrongful act results in both a benefit and an injury, an allowance must be made for the benefit. Mayo v. City of Springfield, 138 Mass. 70, was

covenant against incumbrances, where the covenantor bought in the outstanding incumbrance, and the plaintiff was not actually injured by it, it was held that only nominal damages could be recovered.[295]

Reparation Accepted.

Where the reparation offered is voluntarily accepted, the damages recoverable are the difference between the original loss and the value of the thing returned at the time of acceptance, for that represents the actual loss. One cannot have both the thing itself and damages for its loss. This has been held in actions of trover,[296] trespass,[297] and replevin,[298] where the property wrongfully

an action for placing earth on another's land. The court said: "In determining the extent of the injury to plaintiff's land, the court had a right to consider the benefits, if any, arising from placing the earth upon the land. An allowance for such benefits is not in the nature of recoupment or set-off, but a method of determining the actual damages sustained." See, also, Schroeder v. De Graff, 28 Minn. 299, 9 N. W. 857; Murphy v. City of Fond du Lac, 23 Wis. 365; Jeffersonville, M. & I. R. Co. v. Esterle, 13 Bush, 667; Forsyth v. Wells, 41 Pa. St. 291; McLean County Coal Co. v. Long, 81 Ill. 359; Single v. Schneider, 24 Wis. 299; Winchester v. Craig, 33 Mich. 205; Moody v. Whitney, 38 Me. 174. In an action for flooding lands, an allowance for benefits caused thereby was denied in Gerrish v. Manufacturing Co., 30 N. H. 478, and Tillotson v. Smith, 32 N. H. 90; and granted in Luther v. Winnisimmet Co., 9 Cush. 171; Imboden v. Mining Co., 70 Ga. 86, 116; Brower v. Merrill, 3 Chand. (Wis.) 46; Howe v. Ray, 113 Mass. 88. The allowance is confined to benefits resulting from the overflow, and does not include benefits arising from defendant's collateral operation. Gile v. Stevens, 13 Gray, 146; Talbot v. Whipple, 7 Gray, 122; Marcy v. Fries, 18 Kan. 353. It has been held that no allowance can be made for a benefit. Gerrish v. Manufacturing Co., 30 N. H. 478; Tillotson v. Smith, 32 N. H. 90. In an action for rents and profits, an allowance must be made for improvements, and the expenses necessarily incurred to make the land profitable, provided the improvements and expenses were made in good faith. Hylton v. Brown, 2 Wash. C. C. 165, Fed. Cas. No. 6,983; Hodgkins v. Price, 141 Mass. 162, 5 N. E. 502.

[295] McMuis v. Lyman, 62 Wis. 191, 22 N. W. 405; Hartford & S. Ore Co. v. Miller, 41 Conn. 112.

[296] Barrelett v. Bellgard, 71 Ill. 280; Bowman v. Teall, 23 Wend. 306; McCormick v. Railroad Co., 80 N. Y. 353; Dailey v. Crowley, 5 Lans. 301; Lucas

[297] Hanmer v. Wilsey, 17 Wend. 91; Vosburgh v. Welch, 11 Johns. 175; Gibbs v. Chase, 10 Mass. 125. See Mayo v. City of Springfield, 138 Mass. 70.

[298] De Witt v. Morris, 13 Wend. 496; Conroy v. Flint, 5 Cal. 327.

taken was returned to and accepted by the plaintiff. But even in such cases nominal damages may be recovered.[299] So, also, where property taken has been recovered by the owner, by repurchase or otherwise, the damages for the taking will be reduced by the value of the property recovered; but compensation will be given for the expenses incurred in recovering the property.[300]

Reparation by Third Party.

Reparation made by a third party, if accepted as such, or if of a nature to prevent further loss, will reduce the damages recoverable; but if a benefit received from a third person be a pure gratuity, and not intended to be in lieu of damages, or if it be paid, not by procurement of defendant, but in pursuance to a contract founded on a consideration paid by plaintiff, it will not reduce the damages, though made on account of the injury.[301] Thus, in an action for personal injuries, the fact that a third person, in whose employment plaintiff was, continued his salary during the time he was disabled, will not reduce the damages recoverable from defendant.[302] The defendant is liable for the value of care and nursing, though it was furnished gratuitously.[303] So, also, the payment of insurance money will not operate to reduce damages.[304]

v. Trumbull, 15 Gray, 306; Long v. Lamkin, 9 Cush. 361; Delano v. Curtis, 7 Allen, 470; Perham v. Coney, 117 Mass. 102; Gove v. Watson, 61 N. H. 136; Murphy v. Hobbs, 8 Colo. 17, 5 Pac. 637; Bates v. Clark, 95 U. S. 204; Renfro's Adm'x v. Hughes, 69 Ala. 581; Yale v. Saunders, 16 Vt. 243.

[299] Murray v. Burling, 10 Johns. 172; Reynolds v. Shuler, 5 Cow. 323; Wheelock v. Wheelwright, 5 Mass. 104; Gibbs v. Chase, 10 Mass. 125.

[300] McInroy v. Dyer, 47 Pa. St. 118; Felton v. Fuller, 35 N. H. 226; Dodson v. Cooper, 37 Kan. 346, 15 Pac. 200; Forsyth v. Palmer, 14 Pa. St. 96; Ford v. Williams, 24 N. Y. 359; Baldwin v. Porter, 12 Conn. 473; Johannesson v. Borschenius, 35 Wis. 131; Sprague v. Brown, 40 Wis. 612; Tambaco v. Simpson, 19 C. B. (N. S.) 453. But see Harris v. Eldred, 42 Vt. 39.

[301] Where land on which houses are being built is taken for a city street, the contractor cannot recover damages from both the city and the owner for the same items of loss. Heaver v. Lanahan, 74 Md. 493, 22 Atl. 263.

[302] Ohio & M. R. N. Co. v. Dickerson, 59 Ind. 317. See, also, Elmer v. Fessenden, 154 Mass. 427, 28 N. E. 299. Contra, Drinkwater v. Dinsmore, 80 N. Y. 390.

[303] Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874. See, also, Norristown v. Moyer, 67 Pa. St. 355. But see Peppercorn v. City of Black River Falls, 89 Wis. 38, 61 N. W. 79.

[304] Kingsbury v. Westfall, 61 N. Y. 356; Althorf v. Wolfe, 22 N. Y. 355;

INJURIES TO LIMITED INTERESTS.

43. The measure of damages for injuries to limited interests in property will be considered under the following heads:

(a) Interests in real property in possession and in expectancy (p. 118).

(b) Special property and ultimate ownership in personal property (p. 119).

(c) Interest of mortgagors and mortgagees (p. 120).

(d) Joint interests (p. 120).

Interests in Real Property in Possession and in Expectancy.

One having the right to the possession of real property for a limited time can recover for any interference with his possession or injury to the property only the damages to his own interest, and not for the whole injury. This rule applies to life tenants,[305] lessees,[306] and to mere occupants.[307] But a lessee may recover compensation for the whole injury when he is liable over to his landlord.[308] The owners of expectant interests in land, lessors, reversioners, and remainder-men can recover for injuries to the property only the damages to their own interests.[309]

Briggs v. Railroad Co., 72 N. Y. 26; Carpenter v. Eastern Transp. Co., 71 N. Y. 574; Pittsburg, C. & St. L. Ry. Co. v. Thompson, 56 Ill. 138; Dillon v. Hunt, 105 Mo. 154, 16 S. W. 516; Hammond v. Schiff, 100 N. C. 161, 6 S. E. 753; Hayward v. Cain, 105 Mass. 213; Weber v. Morris & E. R. Co., 36 N. J. Law, 213; Harding v. Townshend, 43 Vt. 536; Perrott v. Shearer, 17 Mich. 48; Texas & P. R. Co. v. Levi, 59 Tex. 674; The Monticello v. Mollison, 17 How. 153; Yates v. Whyte, 4 Bing. N. C. 272. See, also, Congdon v. Scale Co., 66 Vt. 255, 29 Atl. 253; Eureka Fertilizer Co. v. Baltimore Copper, Smelting & Rolling Co., 78 Md. 179, 27 Atl. 1035; Lake Erie & W. R. Co. v. Griffin, 8 Ind. App. 47, 35 N. E. 396.

305 Greer v. Mayor, etc., 1 Abb. Prac. (N. S.) 206.

306 Holmes v. Davis, 19 N. Y. 488; Cf. Terry v. Mayor, etc., 8 Bosw. (N. Y.) 504; Illinois & St. L. Railroad & Coal Co. v. Cobb, 94 Ill. 55.

307 Brown v. Bowen, 30 N. Y. 519.

308 Walter v. Post, 4 Abb. Prac. 382.

309 Cooper v. Randall, 59 Ill. 317; Schnable v. Koehler, 28 Pa. St. 181; Seely v. Alden, 61 Pa. St. 302; Dorsey v. Moore, 100 N. C. 41, 6 S. E. 270; Dutro v. Wilson, 4 Ohio St. 101.

Special Property and Ultimate Ownership in Personal Property.

One having a special property in personal property, such as a lessee,[310] pledgee,[311] factor,[312] or bailee,[313] is treated as the owner in actions against third persons for the loss or injury of the property, and recovers the damages to his own interest and that of the ultimate owner. The same rule obtains in a suit on a replevin bond in nearly all the states,[314] though there are a few decisions contra.[315] If the owner, for any reason, could not recover against the wrongdoer, then the one in possession under a special property can recover only for the injury to his special property.[316] The measure of damages is the same in an action against the owner for conversion or injury to the property.[317] For conversion or injury to property, the owner can recover of one in possession the value of the property, less the defendant's interest therein.[318] Against a third

310 Caswell v. Howard, 16 Pick. 562; St. Louis, I. M. & S. Ry. Co. v. Bigs, 50 Ark. 169, 6 S. W. 724.

311 United States Exp. Co. v. Meints, 72 Ill. 293; Mechanics' & Traders' Bank of Buffalo v. Farmers' & Mechanics' Nat. Bank of Buffalo, 60 N. Y. 40; Adams v. O'Connor, 100 Mass. 515; Pomeroy v. Smith, 17 Pick. 85; Lyle v. Barker, 5 Bin. (Pa.) 457. A depositary may maintain any proper action to protect himself and the depositor. Knight v. Carriage Co., 18 C. C. A. 287, 71 Fed. 662.

312 Groover v. Warfield, 50 Ga. 644.

313 Brewster v. Warner, 136 Mass. 57; Finn v. Railroad Corp., 112 Mass. 524; Garretson v. Brown, 26 N. J. Law, 425; Rooth v. Wilson, 1 Barn. & Ald. 59; Armory v. Delamirie, 1 Strange, 505. But see Claridge v. Tramway Co. [1892] 1 Q. B. 422.

314 Adkins v. Moore, 82 Ill. 240; Broadwell v. Paradice, 81 Ill. 474; Buck v. Remsen, 34 N. Y. 383; Burt v. Burt, 41 Mich. 82, 1 N. W. 936; Frei v. Vogel, 40 Mo. 149; Frey v. Drahos, 7 Neb. 194.

315 Hayden v. Anderson, 17 Iowa, 158; Jennings v. Johnson, 17 Ohio, 154; Latimer v. Motter, 26 Ohio St. 480; Cumberland Coal & Iron Co. v. Tilghman, 13 Md. 74.

316 Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527; Lowell v. Parker, 10 Metc. (Mass.) 309; Mears v. Cornwall, 73 Mich. 78, 40 N. W. 931; Sheldon v. Express Co., 48 Ga. 625.

317 Davidson v. Gunsolly, 1 Mich. 388; Fitzhugh v. Wiman, 9 N. Y. 559; Baldwin v. Bradley, 69 Ill. 32.

318 Fisher v. Brown, 104 Mass. 259; Fowler v. Gilman, 13 Metc. (Mass.) 267; Craig v. McHenry, 35 Pa. St. 120; Wheeler v. Pereles, 43 Wis. 332; Johnson v. Stear, 15 C. B. (N. S.) 330.

person the owner recovers the full value of the property, or compensation for the injury to it.[319]

Interest of Mortgagors and Mortgagees.

A mortgagee of real property can recover for any injury to the mortgaged property, either by the mortgagor or by a third person, the amount in which his security is impaired.[320] A mortgagee of personal property can recover against a stranger full compensation for any injury to the property.[321] But, against the mortgagor, he can recover only the amount due on the mortgage debt, provided this does not exceed the value of the property.[322] A mortgagor of personal property, in an action against the mortgagee, can recover the value of the property less the amount due the mortgagee.[323] Against a stranger, he recovers the value of the property.[324]

Joint Interest.

A joint owner can recover against a co-owner, for injuries to the joint property, or for excluding him from its possession, only a compensation proportioned to his interest.[325] Against third persons,

[319] Green v. Clark, 12 N. Y. 343.

[320] Van Pelt v. McGraw, 4 N. Y. 110; Gardner v. Heartt, 3 Denio, 232; Atkinson v. Hewett, 63 Wis. 396, 23 N. W. 889; State v. Weston, 17 Wis. 107; Schalk v. Kingsley, 42 N. J. Law, 32. For a modification of this rule in Massachusetts, see Gooding v. Shea, 103 Mass. 360; Byrom v. Chapin, 113 Mass. 308. As to recovery by a junior mortgagee, see Jackson v. Turrell, 39 N. J. Law, 329.

[321] Lowe v. Wing, 56 Wis. 31, 13 N. W. 892; Allen v. Butman, 138 Mass. 586; Densmore v. Mathews, 58 Mich. 616, 26 N. W. 146; Adamson v. Petersen, 35 Minn. 529, 29 N. W. 321; White v. Webb, 15 Conn. 302.

[322] Smith v. Phillips, 47 Wis. 202, 2 N. W. 285; Parish v. Wheeler, 22 N. Y. 494; McFadden v. Hopkins, 81 Ind. 459. But the recovery cannot exceed the value of the property. Ganong v. Green, 71 Mich. 1, 38 N. W. 661.

[323] Dahill v. Booker, 140 Mass. 308, 5 N. E. 496; Russell v. Butterfield, 21 Wend. 300; Bearss v. Preston, 66 Mich. 11, 32 N. W. 912; Torp v. Gulseth, 37 Minn. 135, 33 N. W. 550; Deal v. D. M. Osborne & Co., 42 Minn. 102, 43 N. W. 835.

[324] Cram v. Bailey, 10 Gray, 87; Gallatin & N. Turnpike Co. v. Fry, 88 Tenn. 296, 12 S. W. 720; Brown v. Carroll, 16 R. I. 604, 18 Atl. 283.

[325] Green v. Edick, 66 Barb. 564; Cutter v. Waddingham, 33 Mo. 269; Cf. Daniels v. Brown, 34 N. H. 454.

a joint owner can recover only his share. The rule is the same for both real [326] and personal property.[327]

[326] Putney v. Lapham, 10 Cush. 232; Clark v. Huber, 20 Cal. 196; Holdfast v. Shepard, 9 Ired. 222; McGrew v. Harmon, 164 Pa. St. 115, 30 Atl. 265, 268.

[327] Zabriskie v. Smith, 13 N. Y. 322; Bartlett v. Kidder, 14 Gray, 449; Thompson v. Hoskins, 11 Mass. 419; Hillhouse v. Mix, 1 Root (Conn.) 246.

CHAPTER IV.

BONDS, LIQUIDATED DAMAGES, AND ALTERNATIVE CONTRACTS.

44. Penal Bonds.
45–47. Liquidated Damages and Penalties.
48–57. Rules of Construction.
58. Alternative Contracts.

PENAL BONDS.

44. In an action on a penal bond the measure of damages is compensation for the actual loss, not exceeding the penalty named.

Questions involving a consideration of liquidated damages and penalties formerly arose chiefly in connection with that peculiar form of obligation known as a "common-law bond." By a common-law bond the obligor bound himself to pay a certain sum of money, and at a certain time, to the obligee, upon condition, however, that the obligation should be void on the payment of some lesser sum, or the performance of some particular act. There was, however, no agreement to pay the lesser sum, or perform the designated act. Upon breach of condition, therefore, the sum named in the bond, became the debt, and could be recovered in an action of debt on the bond. This sum is called a "penalty"; and the bond, a "penal bond." Blackstone says:[1] "The penalty named in the bond was originally inserted for the purpose of evading the absurdity of those monkish constitutions which prohibited the taking of interest for money, and was therefor pardonably considered the real debt, in the courts of law, when the debtor neglected to perform his agreement for the return of the loan with interest; for the judges could not, as the law then stood, give judgment that the interest should be specifically paid." The rule continued to be enforced however, by courts of law, even after the recovery of interest was allowed by statute. Chancery early assumed jurisdiction to relieve against the penalty

[1] 3 Bl. Comm. 434.

when the obligor was prevented by accident from fulfilling his obligation on the day fixed. This it did by enjoining the execution of the judgment for the penalty, on condition that the obligor would do equity by paying the real debt, with interest for its detention, and costs. Subsequently equity extended its jurisdiction, and relieved against the penalty in all cases of default, from whatever cause, on the payment of just compensation. This was on the broad principle that compensation, not forfeiture, is equity. This practice was ultimately followed by courts of law, and was finally sanctioned by statute. Such statutes are in force generally in the United States. But it would seem that courts of law have power to grant such relief on general principles, without reference to statutes.[2]

Although the damages in an action on a penal bond may be less than the penalty named, as just explained, they can never be greater. This was because such bond contained no agreement to pay the smaller sum or perform the stipulated act. The only promise or undertaking was to pay the penal sum in default of performance of the condition. Hence at common law no action could be maintained except for the penal sum, and of course the damages could never exceed that sum.

LIQUIDATED DAMAGES AND PENALTIES.

45. Liquidated damages are damages agreed upon by the parties as and for compensation for, and in lieu of, the actual damages arising from a breach of contract.[3]

46. A penalty is a sum agreed to be paid or forfeited absolutely upon nonperformance of the contract, regardless of the actual damages suffered, and intended rather to secure performance, than as compensation for a breach.

47. Where the parties to a contract agree upon liquidated damages, the sum fixed is the measure of damages

[2] Betts v. Burch, 4 Hurl. & N. 506. See 2 White & T. Lead. Cas. Eq. (4th Eng. Ed.) 1098.

[3] Dwinel v. Brown, 54 Me. 468, 471, per Appleton, C. J., dissenting.

for a breach, whether it exceeds or falls short of the actual damages; but, where the sum fixed is a penalty, the actual damages suffered, whether more or less, may be recovered.

Intent of the Parties.

In making contracts, the parties are at perfect liberty to stipulate for liquidated damages to be paid by one party to the other as compensation for a breach. On the happening of a breach, the stipulated sum is the precise sum to be recovered, be the actual damages more or less. Equity will not relieve against it.* To have this effect, it is, of course, primarily essential that the parties so intended. If they clearly did not intend to liquidate the damages, no question arises in this connection, and the actual damages will be assessed on ordinary principles. But, where the contract expresses an intention that a certain sum shall be payable absolutely upon a breach, there is great difficulty, and the courts have fallen into much confusion, in determining whether the sum fixed is liquidated damages, to be enforced, or a penalty, to be relieved against. It is frequently said to be solely a matter of intention. A court of law possesses no dispensing power; it cannot inquire whether the parties have acted wisely or rashly in respect to any stipulation they may have thought proper to introduce into their agreements. If they are competent to contract, within the prudential rules the law has fixed as to parties, and there has been no fraud, circumvention, or illegality in the case, the court is bound to enforce the agreement.[4] "The law relative to liquidated damages has always been in a state of great uncertainty. This has been occasioned by judges endeavoring to make better contracts for parties than they have made for themselves. I think that the parties to contracts, from knowing exactly their own situations and objects, can better appreciate the consequences of their failing to obtain those objects than either judges or juries. Whether the contract be under seal or not, if it clearly states what shall be paid by the party who breaks

* In an action to recover a sum stipulated in a contract as liquidated damages, no proof of actual damages is required. Sanford v. First Nat. Bank of Belle Plaine (Iowa) 63 N. W. 459.

[4] Kemp v. Knickerbocker Ice Co., 69 N. Y. 45.

it, to the party to whose prejudice it is broken, the verdict in the action for the breach of it should be for the stipulated sum. A court of justice has no more authority to put a different construction on the part of the instrument ascertaining the amount of damages than it has to decide contrary to any other of its clauses." [5] But the weight of authority will not support this language, in the broad sense in which it is used. Where the contract has expressly designated the amount named as liquidated damages, the courts have held often that it was a penalty, and relieved against it; and conversely, where the contract has called it a penalty, it has been held to be liquidated damages; and, even where the parties have manifestly supposed and intended that an exorbitant and unconscionable amount should be forfeited, the courts have carried out the intent only so far as was right and reasonable.[6] Contracts in terms providing for "liquidated damages," and expressly excluding all idea of a penalty, have nevertheless been construed to provide for a penalty.[7] This has been said to be on the ground that the parties had given a wrong name to the stipulated sum, and that it was, in substance and in fact, a penalty, and not liquidated damages.[8] In another case it was said that where the parties declare, in distinct and unequivocal terms, that they have settled and ascertained the damages to be a certain fixed sum to be paid by the party failing to perform, it seems absurd for the court to tell them that it has looked into the contract, and reached the conclusion that no such thing was intended, but that the intention was to name a sum as a penalty to cover any damages that might be proved to have been sustained by a breach of the agreement.[9] The cases are in

[5] Crisdee v. Bolton, 3 Car. & P. 240, per Best, C. J. See, also, Dwinel v. Brown, 54 Me. 468; Brewster v. Edgerly, 13 N. H. 275; Clement v. Cash, 21 N. Y. 253; Yetter v. Hudson, 57 Tex. 604.

[6] Davis v. U. S., 17 Ct. Cl. 201, 215.

[7] In Kemble v. Farren, 6 Bing. 141, the contract provided for the payment of a fixed sum as "liquidated and ascertained damages, and not a penal sum, or in the nature thereof"; but it was held that the sum named was a penalty. See, also, Monmouth Park Ass'n v. Warren, 55 N. J. Law, 598, 27 Atl. 932.

[8] Lampman v. Cochran, 16 N. Y. 275.

[9] Clement v. Cash, 21 N. Y. 253. And see Rolfe v. Peterson, 2 Brown, Parl. Cas. 436.

great confusion, but, as has been said, "while no one can fail to discover a very great amount of conflict, still it will be found on examination that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case." [10] The whole difficulty lies in the failure to note the distinction between an intent to really liquidate the damages, and an intent that the sum named should be paid at all events. Liquidated damages are simply an estimate of the actual damages made in advance by the parties themselves, and agreed to be paid. A bona fide intent to liquidate the damages is always controlling, but a mere intent that the sum named shall be paid at all events will be disregarded unless the sum fixed be in fact liquidated damages, and not a penalty. Liquidated damages must be estimated on a basis of just compensation, and substantially limited to it, or the sum fixed becomes a penalty, no matter by what name it is called. Parties cannot make what is, in its very nature, a penalty, stipulated damages by merely calling it so. "They would thus be simply changing the names of things, and enforcing, under the name of stipulated damages, what, in its own nature, is but a penalty." [11] "Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted, by express stipulation, to set this principle aside." [12] In determining whether the parties intended to liquidate the damages, the inquiry must always be as to whether the sum is in fact in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the language used, or the intention that it should be actually paid. For example, if the parties should stipulate that, upon failure to deliver a box of cigars on a day named, $1,000 should be paid "as liquidated damages, and not as a penalty," it would be absurd to say that they intended to liquidate the damages, and did not intend to fix a penalty, their language to the contrary notwithstanding. The language used merely imparts an intention that the sum named shall be paid. Liquidated damages must be intended as compensation for losses arising from a breach, or they are not liquidated damages. Clearly,

[10] Jaquith v. Hudson, 5 Mich. 123, 133.

[11] Jaquith v. Hudson, 5 Mich. 123, 136.

[12] Myer v. Hart, 40 Mich. 517, 523.

the $1,000 was not intended as compensation. While courts of law gave the penalty of a bond, the parties intended that the penalty should be paid, as much as they now intend the payment of liquidated damages, but it was nevertheless relieved against in equity, and the same jurisdiction is now exercised by courts of law. This jurisdiction is not confined to relieving against penalties in bonds, but extends to penalties in other forms of contracts as well. In short, stipulations for the payment of liquidated damages will be enforced; stipulations for the payment of penalties will not, no matter by what name they are called.

It must be noted that either party, the plaintiff as well as the defendant, has the right to show that the stipulated sum is a penalty, and not liquidated damages. When the performance of a contract is secured by a penalty, the damages are not limited by it, but may be either greater or less. The actual damages are recoverable.[13] Such contracts differ from penal bonds in that they contain an agreement upon which an action may be maintained, whereas in penal bonds the only agreement is to pay the penalty.

SAME—RULES OF CONSTRUCTION.

48. An intention to liquidate the damages is controlling. In seeking to ascertain the real intent, the courts lean strongly towards a construction that the sum fixed is a penalty, rather than liquidated damages. The language of the parties is not conclusive, and will be strictly construed (p. 129).

49. Where the stipulated sum is wholly collateral to the object of the contract, and is evidently inserted in terrorem as security for performance, it will be construed to be a penalty (p. 130).

50. Where the stipulated sum is to be paid on the nonpayment of a less amount, or on failure to do something of less value, it will generally be construed to be a penalty (p. 131).

[13] Noyes v. Phillips, 60 N. Y. 408.

51. Where the stipulated sum is to be paid on breach of a contract of such a nature that the damages arising from a breach may be either much greater or much less than the sum fixed, it will be construed to be a penalty (p. 132).

52. Where the stipulated sum is to be paid on the breach of a contract of such a nature that the damages resulting from a breach would be uncertain, and incapable or difficult of being estimated by any definite standard, it will generally be construed to be liquidated damages, if reasonable in amount (p. 133).

53. Where the stipulated sum is to be paid on the breach of a contract of such a nature that the damages arising from a breach are capable of exact measurement by a definite standard, the sum fixed, if materially variant from the actual damages, will usually be regarded as a penalty; but where such sum is fixed to cover contemplated consequential losses, not recoverable under legal rules, and is not more than a reasonable compensation therefor, it may be sustained as liquidated damages (p. 137).

54. Where the contract provides that a certain sum, deposited to secure performance, shall be forfeited for nonperformance, the sum deposited, if reasonable in amount, will be construed to be liquidated damages (p. 138).

55. Where the stipulated sum is to be paid on any breach of a contract containing several stipulations of widely different degrees of importance, it is usually held to be a penalty (p. 138).

56. A sum stipulated to be paid upon a breach of contract cannot be recovered as liquidated damages upon a partial breach, where the other party has accepted part performance (p. 140).

57. A sum stipulated to be paid in evasion of the usury laws will be regarded as a penalty (p. 141).

General Rule of Construction—Form of Contract.

An agreement to liquidate damages is always controlling, and courts and juries are confined to the sum fixed in assessing damages for a breach. But the intent must be to liquidate damages in the technical sense already explained. A mere intent that the sum fixed shall be paid, however strongly expressed, is insufficient. If the parties, in assessing their own damages, disregard the fundamental principle that damages are a compensation for losses sustained, the sum fixed is not liquidated damages.* It is intrinsically a penalty, and the parties cannot make it anything else by giving it a different name, and stipulating that it shall be paid. When the sum fixed, however, is not an unreasonable compensation for a breach, the question remains whether it was intended as liquidated damages or a penalty. This is a question of law for the court. This intent must be ascertained from the language used, interpreted in the light of surrounding circumstances. The use of the words "penalty" or "forfeit," on the one hand, or "liquidated damages," on the other, is not conclusive. Nevertheless, the language used is a guide, and may turn the scales in doubtful cases.

There are four forms of contracts in which the question under discussion is usually presented.

First. The contract may be to do or refrain from doing a particular thing, or, in the alternative, to pay a stipulated sum of money. If it was really intended to give the party an option to do the thing or pay the money, the stipulated sum cannot properly be called either a penalty or liquidated damages. If the party perform either alternative, the contract is not broken, and the question under discussion does not arise. Nevertheless, this form of contract may be but a cloak to cover a penalty, in which case the court will relieve against it. Prima facie, however, it is an alternative contract.[14]

Second. The contract may be in the form of a common-law bond. In this form of contract the real object of the parties is expressed in the condition. There is no express promise to do anything, but performance is secured under pain of the penalty. Prima facie, the

* Doane v. Railway Co., 51 Ill. App. 353; Condon v. Kemper, 47 Kan. 126, 27 Pac. 829.

[14] See post, p. 141.

sum stipulated in a bond is a penalty; but, nevertheless, it has sometimes been held to be liquidated damages.[15]

Third. The contract may bind the parties to do or refrain from doing a certain thing, and provide that, in case of default, a certain sum shall be paid as a penalty. Prima facie, the sum named in this class of contracts is a penalty; but the presumption is not so strong as in the case of bonds, and it has been frequently held to be liquidated damages.[16]

Fourth. The agreement may be in the same form as the last, except the stipulated sum is called "liquidated damages", or a "forfeiture." This language will be given its literal effect only where the sum named is in fact reasonable compensation for a breach. In that case it would probably overcome the leaning of the courts towards construing all such stipulations to provide for penalties. In all other cases it would nevertheless be held to be a penalty. Stipulations for liquidated damages are strictly construed.[17]

Collateral Sum in Terrorem.

Where the sum stipulated to be paid upon a breach of contract is wholly collateral to the object of the contract, and is so excessive as to show clearly that it was not fixed on a basis of compensation, it is evident that it was inserted, in terrorem, to secure performance, and it therefore falls within the definition of "penalty" given in the black letter text. The ordinary penal bond is an illustration of this class of cases. Such bonds are given to secure a variety of agreements, such as to submit to arbitration,[18] to convey land,[19] or to faithfully perform the duties of an office. The penalty is usually fixed at twice the estimated actual damages likely to result from a breach. Where defendant agreed to let plaintiff have the use of a certain building so long as it stood, and gave him a note payable

15 Studabaker v. White, 31 Ind. 212; Fisk v. Fowler, 10 Cal. 512; Duffy v. Shockey, 11 Ind. 70; Clark v. Barnard, 108 U. S. 436, 453, 2 Sup. Ct. 878.

16 Suth. Dam. § 284.

17 Grand Tower Min. Manuf'g & Transp. Co. v. Phillips, 23 Wall. 471; Hamilton v. Moore, 33 U. C. Q. B. 520.

18 Henry v. Davis, 123 Mass. 345. The same rule is applied to an ordinary contract. Spear v. Smith, 1 Denio, 464; Henderson v. Cansler, 65 N. C. 542.

19 Brown v. Bellows, 4 Pick. 179; Robeson v. Whitesides, 16 Serg. & R. 320; Burr v. Todd, 41 Pa. St. 206.

upon a breach, it was held to be a penalty.[20] An agreement to return a lease loaned within a certain time, or in default thereof to pay $3,000, was held to provide for a penalty, as the sum named was wholly collateral to the object of the contract.[21]

Sum Payable on Nonpayment of Smaller Sum.

"Where a large sum, which is not the actual debt, is agreed to be paid in case of a default in the payment of a less sum, which is the real debt, such larger sum is always a penalty."[22] This is because it is evident that the principle of compensation has been departed from. But where the larger sum is the real debt, and the debtor has simply an option to discharge it by the payment of a less sum, if paid at a particular term or in a specified manner, upon failure to pay the smaller sum at the time and in the manner specified, payment of the larger sum may be enforced.[23] In such a case, the question under discussion does not properly arise. The parties have not intended to stipulate for either liquidated damages or a penalty. The contract is in fact an alternative one. The real intent of the parties is the decisive thing. No form of words can be used which will cloak a penalty. "Although, as a general rule, it is acknowl-

[20] Merrill v. Merrill, 15 Mass. 488.

[21] Burrage v. Crump, 3 Jones (N. C.) 330.

[22] Suth. Dam. § 288.

[23] Mayne, Dam. § 166; Suth. Dam. § 288; Thompson v. Hudson, L. R. 4 H. L. 1, L. R. 2 Eq. 612; Ashtown's Lessee v. White, 11 Ir. Law R. 400; McNitt v. Clark, 7 Johns. 465; Carter v. Corley, 23 Ala. 612; Berrinkatt v. Traphagen, 39 Wis. 219. But see Longworth v. Askren, 15 Ohio St. 370. We regard this decision as unsound. A note providing that it may be discharged by payment of a sum less than its face, if paid before maturity, is valid; and the larger sum is not a penalty. Jordan v. Lewis, 2 Stew. (Ala.) 426; Carter v. Corley, 23 Ala. 612; Waggoner v. Cox, 40 Ohio St. 539, 543; Campbell v. Shields, 6 Leigh (Va.) 517. Contra, Moore v. Hylton, 1 Dev. Eq. (N. C.) 429. A provision in a note that, if it is not paid at maturity, a certain further sum should be paid as liquidated damages for delay, has been sustained, when such additional amount was reasonable. Sutton v. Howard, 33 Ga. 536; Yetter v. Hudson, 57 Tex. 604. Contra, Taul v. Everet, 4 J. J. Marsh. 10; Brockway v. Clark, 6 Ohio, 45. Where a note provides that it shall bear interest from date if not paid at maturity, the accumulated interest may be recovered as liquidated damages on nonpayment at maturity. Reeves v. Stipp, 91 Ill. 609; Wilson v. Dean, 10 Iowa, 432; Rogers v. Sample, 33 Miss. 310. Contra, Waller v. Long, 6 Munf. 71.

edged that the intention of the parties, as expressed in the contract, should be enforced, still it is clearly ignored in that class of cases where the parties stipulate for the payment of a large sum of money for the nonpayment of a smaller sum at a given day. In such cases, it is said, no matter what may be the language of the parties, the larger sum will be deemed a penalty." [24] The intrinsic nature of the transaction governs, [25] and evidence of surrounding circumstances is admissible to show the real intent, "though the words are to be taken as proved exclusively by the writing." [26]

Sum Stipulated not Proportioned to Injury.

Where the actual damages arising from a breach may be either greatly more or greatly less than the stipulated sum, according to the time of the breach, such sum will usually be regarded as a penalty. Thus, it was said, in a Michigan case:[27] "The plaintiffs in error were to have $1.50 per M. for drawing the timber, $1 of which was to be paid as the timber was drawn, * * * and the remaining 50 cents in cash when all the timber was drawn. In the language of the contract 'it being understood that the balance kept back is to secure the completion of this contract; and it is hereby agreed between the parties that the fifty cents per thousand feet is settled, fixed, and liquidated damages. * * *' They having failed to draw all the timber, the question is whether the 50 cents per 1,000 feet on what was drawn, and which was to be paid on completion of the contract, is to be regarded as stipulated damages, or in the nature of a forfeiture or penalty for not completing the contract. The court below charged the jury that the 50 cents per 1,000 feet on what had been drawn was stipulated damages. In this we think the court erred. If stipulated damages for nonperformance of the entire contract, the defendant could not recover any other or greater damages for a nonperformance in whole or in part. And it would follow that he would recover no damages whatever on the contract had the plaintiff in error refused to draw any of

[24] Morris v. McCoy, 7 Nev. 399.

[25] Bryton v. Marston, 33 Ill. App. 211; Bagley v. Peddie, 5 Sandf. 192; Niver v. Rossman, 18 Barb. 50.

[26] Foley v. McKeegan, 4 Iowa, 1, 5; Perkins v. Lyman, 11 Mass. 76; Brewster v. Edgerly, 13 N. H. 275.

[27] Davis v. Freeman, 10 Mich. 188.

the timber. Such, clearly, could not have been the intention of the parties. They must have intended that, if the plaintiff in error should draw part of the timber, and not the whole, they should not be paid the 50 cents per 1,000 feet on what had been drawn by them. That, in the language of the contract, should be 'fixed and liquidated damages.' If the contract had provided for the payment of 50 cents per 1,000 feet as liquidated damages for the timber not drawn, the case would be altogether different. For the nearer such contract was completed, the less would be the damages. The damages would be proportioned to the nonperformance. But the contrary would be the case, as the contract is, if the 50 cents per 1,000 is to be regarded as liquidated damages, and not as a penalty; for, the nearer the contract is completed, the greater are the damages in case of failure. * * * The policy of the law will not permit parties to make that liquidated damages, by calling it such in their contract, which in its nature is clearly a penalty or forfeiture for nonperformance. While it allows them, in certain cases, to fix their own damages, it will in no case permit them to evade the law by agreement." Contracts providing that an employé shall forfeit all wages due him if he wrongfully quits the service, belong to this class of cases and will be regarded as stipulating for a penalty.[28] And, generally, where a contract provides for payment in installments, and stipulates that a certain proportion shall be retained from each installment, the whole to be forfeited upon a breach, the sum retained is considered a penalty.[29]

Stipulated Sum where Damages are Uncertain.

Where the damages resulting from a breach of contract cannot be measured by any definite pecuniary standard, as by market value or the like, but are wholly uncertain, the law favors a liquidation of the damages by the parties themselves; and where they stipulate for a reasonable amount, it will be enforced. But, even if the dam-

[28] Richardson v. Woehler, 26 Mich. 90.

[29] Savannah & C. R. Co. v. Callahan, 56 Ga. 331; Jemmison v. Gray, 29 Iowa, 537; Potter v. McPherson, 61 Mo. 240; Dullaghan v. Fitch, 42 Wis. 679; Jackson v. Cleveland, 19 Wis. 400. But where the sum was not excessive, it has been allowed as liquidated damages. See Elizabethtown & P. R. Co. v. Geoghegan, 9 Bush, 56; Geiger v. Railroad Co., 41 Md. 4; Easton v. Pennsylvania & O. Canal Co., 13 Ohio, 79.

ages are uncertain, if there is a glaring disproportion between the sum agreed to be paid in default of performance, and the probable advantages of performance, it will be deemed a penalty. Here, as in all cases the facts of the transaction must not negative an intention to fix a sum which would be reasonable compensation. The uncertainty spoken of must be as to the actual nature and extent of the damage; not as to the legal measure to be applied. Stipulations for liquidated damages have been upheld in actions for breach of marriage promise,[30] breach of contract for the sale of property of uncertain value,[31] breach of agreement not to carry on business,[32] delay in the performance of contracts,[33] failure to abate a

[30] Lowe v. Peers, 4 Burrows, 2225; Abrams v. Kounts, 4 Ohio, 214.

[31] Gammon v. Howe, 14 Me. 250; Chamberlain v. Bagley, 11 N. H. 234; Mead v. Wheeler, 13 N. H. 351; Main v. King, 10 Barb. 59; Streeper v. Williams, 48 Pa. St. 450; Durst v. Swift, 11 Tex. 273; Yenner v. Hammond, 36 Wis. 277; Burk v. Dunn, 55 Ill. App. 25. This rule was applied to a contract to exchange farms which provided that the party failing to perform should "forfeit and pay as damages" a fixed sum, and the sum was held liquidated damages. Gobble v. Linder, 76 Ill. 157. In New York it is held that the damages for breach of an ordinary contract for the sale or exchange of lands are not uncertain, and a stipulation for liquidated damages cannot be sustained upon this ground. Noyes v. Phillips, 60 N. Y. 408; Richards v. Edick, 17 Barb. 260; Laurea v. Bernauer, 33 Hun, 307. But if the sum fixed is reasonable in amount, and clearly intended as compensation, it is recoverable as liquidated damages. Slosson v. Beadle, 7 Johns. 72; Hasbrouck v. Tappen, 15 Johns. 200; Knapp v. Maltby, 13 Wend. 587. Otherwise not. Dennis v. Cummins, 3 Johns. Cas. 297. Where a grantor agreed, in case the grantee was evicted, to refund the consideration with interest, that sum was held to be liquidated damages. Bradshaw v. Craycroft, 3 J. J. Marsh. 77. An interest in a partnership is sufficiently uncertain in value to sustain a stipulation for liquidated damages. Maxwell v. Allen, 78 Me. 32, 2 Atl. 386; Lynde v. Thompson, 2 Allen, 456. For failure to purchase a business as agreed, $25,000 was held to be liquidated damages. Woodbury v. Turner, Day & Woolworth Manuf'g Co. (Ky.) 29 S. W. 295.

[32] A sum agreed to be paid upon breach of an agreement not to carry on a particular trade, business, or profession within certain limits or within a specified time is nearly always regarded as liquidated damages. Jaquith v. Hudson, 5 Mich. 123; Tode v. Gross, 127 N. Y. 480, 28 N. E. 469; Mott v. Mott, 11 Barb. 127; Applegate v. Jacoby, 9 Dana, 206; Dakin v. Williams, 17 Wend. 447; Williams v. Dakin, 22 Wend. 210; DeGroff v. American Linen-

[33] See note 33 on following page.

nuisance,[34] disclosure of trade secrets,[35] and in various other cases.[36] Anything, in fact, that tends to make the damages difficult to estimate, such as the absence of witnesses, or the difficulty

Thread Co., 24 Barb. 375; Nobles v. Bates, 7 Cow. 307; Smith v. Smith, 4 Wend. 468; Pierce v. Fuller, 8 Mass. 223; Cushing v. Drew, 97 Mass. 445 (contra, Perkins v. Lyman, 11 Mass. 76); Mueller v. Kleine, 27 Ill. App. 473; California Steam Nav. Co. v. Wright, 6 Cal. 258; Streeter v. Rush, 25 Cal. 67; Grasselli v. Lowden, 11 Ohio St. 349; Newman v. Wolfson, 69 Ga. 764; Lightner v. Menzel, 35 Cal. 452; Bigony v. Tyson, 75 Pa. St. 157; Barry v. Harris,

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[33] A stipulation in a building contract for the payment of a reasonable sum for each day or week the work is delayed beyond the agreed time will be sustained as liquidated damages for the delay. Fletcher v. Dyche, 2 Term R. 32; Legge v. Harlock, 12 Q. B. 1015; Crux v. Aldred, 14 Wkly. Rep. 656; Hennessy v. Metzger, 152 Ill. 505, 38 N. E. 1058; Mueller v. Kleine, 27 Ill. App. 473; Curtis v. Brewer, 17 Pick. 513; Folsom v. McDonough, 6 Cush. 208; Hall v. Crowley, 5 Allen, 304; Bridges v. Hyatt, 2 Abb. Prac. 449; O'Donnell v. Rosenberg, 14 Abb. Prac. (N. S.) 59; Farnham v. Ross, 2 Hall, 167; Weeks v. Little, 47 N. Y. Super. Ct. 1; Worrell v. McClinaghan, 5 Strob. 115; Welch v. McDonald, 85 Va. 500, 8 S. E. 711, Jones v. Reg., 7 Can. Sup. Ct. 570; Monmouth Park Ass'n v. Wallis Iron Works, 55 N. J. Law, 132, 26 Atl. 140. Contra, Wilcus v. Kling, 87 Ill. 107; Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890 (under Code Civ. Proc. § 1671); Brennan v. Clark, 29 Neb. 385, 45 N. W. 472. See Jennings v. Miller (Tex. Civ. App.) 32 S. W. 24. Cf. Mills v. Paul (Tex. Civ. App.) 30 S. W. 558; Collier v. Betterton, 87 Tex. 440, 29 S. W. 467. See, generally, Ward v. Hudson River Bldg. Co., 125 N. Y. 230, 26 N. E. 256; Pettis v. Bloomer, 21 How. Prac. 317; De Graff, Vrieling & Co. v. Wickham (Iowa) 52 N. W. 503; O'Brien v. Anniston Pipe-Works, 93 Ala. 582, 9 South. 415. But, where the work is abandoned, the stipulated sum cannot be recovered for an indefinite time. Hahn v. Horstman, 12 Bush (Ky.) 249; Greer v. Tweed, 13 Abb. Prac. (N. S.) 427; Colwell v. Lawrence, 36 How. Prac. 306. A gross sum payable at once on delay in completing a building beyond a certain time, is a penalty. Tayloe v. Sandiford, 7 Wheat. 13; Savannah & C. R. Co. v. Callahan, 56 Ga. 331. Contra, Allen v. Brazier, 2 Bailey (S. C.) 293. The sum fixed must be reasonable compensation for the actual damage. Clements v. Railroad Co., 132 Pa. St. 445, 19 Atl. 274, 276. The principle applies to other contracts. Harmony v. Bingham, 12 N. Y. 99; Walker v. Engler, 30 Mo. 130; Young v. White, 5 Watts (Pa.) 460; Bergheim v. Steel Co., L. R. 10 Q. B. 319.

[34] Grasselli v. Lowden, 11 Ohio St. 349.

[35] Nessle v. Reese, 29 How. Prac. 382; Bagley v. Peddie, 16 N. Y. 469; Reindel v. Schell, 4 C. B. (N. S.) 97.

[36] See note 36 on following page.

of procuring testimony, may be considered as bearing upon the motive in stipulating damages.[37]

49 Vt. 392; Stevens v. Pillsbury, 57 Vt. 205 (Smith v. Wainwright, 24 Vt. 97, overruled); Stewart v. Bedell, 79 Pa. St. 336 (but see Moore v. Colt, 127 Pa. St. 289, 18 Atl. 8); Johnson v. Gwinn, 100 Ind. 466; Holbrook v. Tobey, 66 Me. 410; Cheddick's Ex'r v. Marsh, 21 N. J. Law, 463; Hoagland v. Segur, 38 N. J. Law, 230; Dunlop v. Gregory, 10 N. Y. 241. But see Wilcus v. Kling, 87 Ill. 107. In Wilkinson v. Colley, 164 Pa. St. 35, 30 Atl. 286, such a contract by a physician was held to provide for a penalty. Such agreements are not considered alternative. Stewart v. Bedell, 79 Pa. St. 336. Nor can the stipulation for liquidated damages be defeated on the ground that, the contract being a continuing one, the sum fixed is payable on any one of various breaches of different importance. Atkyns v. Kinnier, 4 Exch. 777; Galsworthy v. Strutt, 1 Exch. 659; Green v. Price, 13 Mees. & W. 695; Price v. Green, 16 Mees. & W. 346; Hathaway v. Lynn, 75 Wis. 186, 43 N. W. 956; Streeter v. Rush, 25 Cal. 67; Cushing v. Drew, 97 Mass. 445; Grasselli v. Lowden, 11 Ohio St. 349; Moore v. Colt, 127 Pa. St. 289, 18 Atl. 8; Leary v. Laflin, 101 Mass. 334; Dakin v. Williams, 17 Wend. 447; Spicer v. Hoop, 51 Ind. 365; Dunlop v. Gregory, 10 N. Y. 241; Duffy v. Shockey, 11 Ind. 70. In Little v. Banks, 85 N. Y. 258, the defendant was the publisher of the New York Court of Appeals Reports. He had contracted to keep them for sale, and to sell to dealers as required; and $100 was stipulated to be paid as liquidated damages for a breach. It was held that this sum could be recovered for a breach, though the actual damages for failure to deliver a single copy might be very much less than a failure to deliver a larger number.

[36] A stipulation liquidating the damages for the total loss of a bargain for the purchase or lease of lands will be enforced. Leggett v. Insurance Co., 50 Barb. 616, 53 N. Y. 394; Heard v. Bowers, 23 Pick. 455; Tingley v. Cutler, 7 Conn. 291; Knapp v. Maltby, 13 Wend. 587; Slosson v. Beadle, 7 Johns. 72; Lynde v. Thompson, 2 Allen, 456; Lampman v. Cochran, 19 Barb. 388, 16 N. Y. 275; Mundy v. Culver, 18 Barb. 336; Clement v. Cash, 21 N. Y. 253; Hasbrouck v. Tappen, 15 Johns. 200. Or of personal property. Pierce v. Young, 10 Wis. 30; Allen v. Brazier, 2 Bailey, 55; Main v. King, 10 Barb. 59; Knowlton v. Mackay, 29 U. C. C. P. 601. An agreement to forfeit tuition fees paid in advance in case of expulsion from school provides for liquidated damages, and not a penalty. Fessman v. Seeley (Tex. Civ. App.) 30 S. W. 268. Forfeiture of reasonable proportion of wages for quitting without notice will be upheld. Tennessee Manuf'g Co. v. James, 91 Tenn. 154, 18 S. W. 262. A contract of employment providing that the employé shall pay $1,000 as liquidated damages, in case he shall become intoxicated, provides for liquidated damages, and not a penalty, although it is possible for a breach to occur with no actual damages other than nominal. Keeble v. Keeble, 85 Ala. 552, 5 South. 149.

[37] Cotheal v. Talmage, 9 N. Y. 551; Bagley v. Peddie, 16 N. Y. 469

Stipulated Sum where Damages are Certain.

Where damages can be easily and precisely determined by a definite pecuniary standard as by proof of market values, but the parties have stipulated for a much larger sum, such sum will usually be held to be a penalty; for it is evident that the principle of compensation has been disregarded. The principle here is the same as where a smaller sum of money is secured by a larger.[38] Whenever the damages can be ascertained with reasonable certainty, the strong tendency is to regard a stipulated sum materially variant therefrom as a penalty. We have seen, however, that the damages recoverable under legal rules seldom constitute complete indemnity, and in cases of contracts, therefore, the law permits the parties to provide for this contingency. They may stipulate for a compensation for losses which the law would regard as too remote or uncertain to be considered, and if the stipulation is reasonable, it will be enforced as liquidated damages.[39] This is but an application of the

[38] "There are no peculiar reasons why a stipulated sum should be treated as a penalty for exceeding just compensation for a default in the payment of money, and not be so treated in case of a different agreement, where the excess is capable of being made equally manifest." Suth. Dam. § 289; Fisher v. Bidwell, 27 Conn. 363. Where parties bind themselves in a certain sum to abide by an award, the sum is a penalty, and only the award, with interest, can be recovered. Stewart v. Grier, 7 Houst. 378, 32 Atl. 328.

[39] Jaqua v. Headington, 114 Ind. 309, 16 N. E. 527; Nielson v. Read, 12 Fed. 441; Gallo v. McAndrews, 29 Fed. 715; Hodges v. King, 7 Metc. (Mass.) 583; Manice v. Brady, 15 Abb. Prac. 173; Durst v. Swift, 11 Tex. 273; Walker v. Engler, 30 Mo. 130; Cotheal v. Talmage, 9 N. Y. 551; Fitzpatrick v. Cottingham, 14 Wis. 237; Easton v. Canal Co., 13 Ohio, 80; Bradshaw v. Craycraft, 3 J. J. Marsh. (Ky.) 79; Ex parte Hodges, 24 Ark. 197; Talcott v. Marston, 3 Minn. 339 (Gil. 238); Shreve v. Brereton, 51 Pa. St. 175; Knapp v. Maltby, 13 Wend. 587; Powell v. Burroughs, 54 Pa. St. 329; Johnston v. Cowan, 59 Pa. St. 275; Keeble v. Keeble, 85 Ala. 552, 5 South. 149. But if the sum fixed varies materially from a just compensation, or if the intention is doubtful, the sum will be held a penalty. Dennis v. Cummins, 3 Johns. Cas. 297; Lindsay v. Anesley, 6 Ired. (N. C.) 188; Mills v. Fox, 4 E. D. Smith, 220; Esmond v. Van Benschoten, 12 Barb. 366, Baird v. Tolliver, 6 Humph. (Tenn.) 186. A provision in a lease for $5,000 damages, to cover interruption of earnings and other losses in addition to unpaid rent, in case of breach by the lessee, when, on an actual breach, no substantial damage has been suffered, must be held to be a penalty. Gay Manuf'g Co. v. Camp, 25 U. S. App. 134, 13 C. C. A. 137, 65 Fed. 791. Where the provisions of payment in an agree-

rule that the damages for a breach of contract are such as were contemplated at the time the contract was made.

Sum Deposited to be Forfeited on Breach.

Where a sum is deposited, and the contract declares that it shall be forfeited for nonperformance, if reasonable in amount, it will be enforced as liquidated damages.[40] In Wallis v. Smith [41] it was said, in this connection: "In that there seems to me to be great good sense, and for this reason: that if a fund is set apart to meet a particular contingencey, which is described, and that contingency arises, it is difficult to say that the stakeholder, or other person having the fund, is not to hand it over at once to the person who claims it under the contingency that has happened." The sum deposited must be reasonable.[42]

Sum Stipulated for Breach of Contract for Several Things.

Where a contract contains stipulations for several things of widely different degrees of importance, it is obvious that a fixed sum made payable on the breach of any of them cannot be based on the principle of compensation. This is still more apparent where the damages for some breaches can be accurately measured, and the sum fixed is in excess of that sum; but it is equally true though the dam-

ment for the use of a certain machine are that the lessee shall keep an account of the work done by the machine, and pay ratably therefor, "and, if said lessee shall fail or neglect to keep an account" of the work so done, "the lessor may, at his option, either" employ some suitable person to take the account for him, or "charge said lessee, in lieu of" the ratable price named, "the sum of five dollars per day for each of said machines," the alternative will not be construed as a penalty, but as fixing upon a roughly-estimated per diem equivalent, where the difference is not too great to admit of that conclusion. Standard Button-Fastening Co. v. Breed, 163 Mass. 10, 39 N. E. 346.

[40] Reilly v. Jones, 1 Bing. 302; Hinton v. Sparkes, L. R. 3 C. P. 161; Lea v. Whitaker, L. R. 8 C. P. 70; Magee v. Lavell, L. R. 9 C. P. 107; Swift v. Powell, 44 Ga. 123; Perzell v. Shook, 53 N. Y. Super. Ct. 501; Mathews v. Sharp, 99 Pa. St. 560; Eakin v. Scott, 70 Tex. 442, 7 S. W. 777. See Stillwell v. Temple, 28 Mo. 156.

[41] 21 Ch. Div. 243.

[42] Chaude v. Shepard, 122 N. Y. 397, 25 N. E. 358. It was held in this case, however, that the rule only applied in cases where the deposit was made in part performance of the contract, and not where it was mere security. But see In re Dagenham (Thames) Dock Co., 8 Ch. App. 1022.

ages cannot be accurately measured for any breach, for it is logically certain that one sum cannot be fair compensation for a breach of either of two stipulations of widely different value or importance. In Lyman v. Babcock[43] it was said: "Where the sum is agreed to be paid for any of several breaches of the contract, and the damages resulting from the breach of all of them are uncertain, and there is no fixed rule for measuring them, but the breaches are apparently of various degrees of importance and injury, the cases are conflicting in the rule whether the sum should be held as a penalty or as liquidated damages. On principle we are very clear that in such a case the sum should be held as a penalty; for it appears to us that it would be as unjust to sanction a recovery of the sum agreed to be paid alike for any one trivial breach, or for any one important breach, or for breach of the whole contract, as it would be to sanction such a recovery equally for damages certain and uncertain in their nature. The rule holding the sum to be a penalty in the latter case goes upon the injustice of allowing such a recovery for a less amount of actual damages ascertained or readily ascertainable. And we cannot but think that there is like injustice in allowing equally, in case of damages, uncertain indeed, but manifestly and materially different in amount, equally for breach of part of the contract, and for breach of the entire contract. Such a rule would not only put the same value on a small part as on a large part, but would put the same value on any part as on the whole." This is believed to be a correct statement of the law, though the courts have not always found it necessary to state the rule so broadly.[44]

[43] 40 Wis. 503, 517.

[44] Kemble v. Farren, 6 Bing. 141; Foley v. McKeegan, 4 Iowa, 1; Moore v. Colt, 127 Pa. St. 289, 18 Atl. 8; Curry v. Larer, 7 Pa. St. 470; McCullough v. Manning, 132 Pa. St. 43, 18 Atl. 1080; Keck v. Bieber, 148 Pa. St. 645, 24 Atl. 170; Hathaway v. Lynn, 75 Wis. 186, 43 N. W. 956; Fitzpatrick v. Cottingham, 14 Wis. 219; Trustees of First Orthodox Congregational Church v. Walrath, 27 Mich. 232; Daily v. Litchfield, 10 Mich. 29; Bryton v. Marston, 33 Ill. App. 211; Trower v. Elder, 77 Ill. 453; Lord v. Gaddis, 9 Iowa, 265; Hallock v. Slater, Id. 599; Clement v. Cash, 21 N. Y. 253; Niver v. Rossman, 18 Barb. 50; Staples v. Parker, 41 Barb. 648; Lansing v. Dodd, 45 N. J. Law, 525; Hoagland v. Segur, 38 N. J. Law, 230; Cheddick's Ex'r v. Marsh, 21 N. J. Law, 463; Brown v. Bellows, 4 Pick. 179; Chase v. Allen, 13 Gray, 42; Shute v. Taylor, 5 Metc. (Mass.) 61; Higginson v. Weld, 14 Gray, 165; Watts

Where the damages for the breach of one of the stipulations can be accurately measured, as where it is for the payment of a sum of money, and this sum is less than the stipulated sum, the latter is clearly a penalty.[45]

Partial Breach.

A sum stipulated to be paid upon a breach of contract cannot be recovered as liquidated damages for a partial breach, for one sum cannot consistently be compensation alike for either a total or a partial breach;[46] and, of course, if it appears from the language used that the stipulation was meant to be applicable only to a total breach, it will be disregarded in an action for a partial breach.[47] But a contract containing several stipulations may be of such a nature that breach of any one of them will defeat the entire object of the contract, in which case any breach is really a total breach, and the sum named, if reasonable, may be recovered as liquidated damages.[48] So, also, a partial breach may justify the other party in treating the contract as at an end, and, if he does so, the sum named may be recovered; but, if he accepts part performance, it cannot.[49]

v. Camors, 115 U. S. 353, 6 Sup. Ct. 91; Bignall v. Gould, 119 U. S. 495, 7 Sup. Ct. 294; Higbie v. Farr, 28 Minn. 439, 10 N. W. 592; Cook v. Finch, 19 Minn. 407 (Gil. 350); Gower v. Saltmarsh, 11 Mo. 271; Nash v. Hermosilla, 9 Cal. 585; Hammer v. Breidenbach, 31 Mo. 49; St. Louis & S. F. Ry. Co. v. Shoemaker, 27 Kan. 677.

[45] Clement v. Cash, 21 N. Y. 253; Cotheal v. Talmage, 9 N. Y. 551; Lampman v. Cochran, 16 N. Y. 275. But see Brewster v. Edgerly, 13 N. H. 275.

[46] Sedg. Dam. § 415.

[47] Cook v. Finch, 19 Minn. 407 (Gil. 350).

[48] The object of a contract to abstain from the use of intoxicating liquors during a certain period is defeated by a single breach, and the sum named may be recovered as liquidated damages. Keeble v. Keeble, 85 Ala. 552, 5 South. 149. In an action on a bond conditioned that defendant would marry a certain woman, treat her as a wife should be treated, and give her no cause for divorce, the plaintiff need not prove a breach of all the conditions. Stanley v. Montgomery, 102 Ind. 102, 26 N. E. 213. The same ruling was made in an action on a contract not to employ union men, or to use union labels, or to buy or sell articles bearing union labels. Schrader v. Lillis, 10 Ont. 358.

[49] Wibaux v. Live Stock Co., 9 Mont. 154, 165, 22 Pac. 492; Hoagland v. Segur, 38 N. J. Law, 230; Shute v. Taylor, 5 Metc. (Mass.) 61; Watts' Ex'rs v. Sheppard, 2 Ala. 425; Berry v. Wisdom, 3 Ohio St. 241; Lampman v. Cochran, 16 N. Y. 275, per Shankland, J.; Shiell v. McNitt, 9 Paige, 101; Mundy v. Culver, 18 Barb. 336.

In the latter alternative it has been held, in some cases, that the sum fixed was a penalty;[50] in others, judgment has been given for a proportional part.[51]

Stipulations in Evasion of Usury Laws.

Where the sum stipulated to be paid on the breach of a contract would constitute an evasion of the usury laws, it will be treated as a penalty.[52] The law itself has fixed this limit of compensation in this class of cases, and therefore a stipulation for a greater sum cannot be regarded as based on the principle of compensation. It is, therefore, a penalty, if, indeed, it is not absolutely void.[53]

ALTERNATIVE CONTRACTS.

58. The measure of damages for the breach of an alternative contract is compensation for the least beneficial alternative.

An alternative contract is one which may be executed by doing either of several acts at the election of the party from whom performance is due.[54] The contract is completely performed when any one of the alternatives is performed, and so, of course, no question of damages for a breach arises. An alternative contract is not a contract for liquidated damages.[55] To constitute an alternative contract there must have been an intention to really give the party

[50] Town of Wheatlands v. Taylor, 29 Hun, 70; Shute v. Taylor, 5 Mete. (Mass.) 61.

[51] Watts' Ex'rs v. Sheppard, 2 Ala. 425. See Chase v. Allen, 13 Gray, 42.

[52] Clark v. Kay, 26 Ga. 403; Brown v. Maulsby, 17 Ind. 10; Kurtz v. Sponable, 6 Kan. 395; Davis v. Freeman, 10 Mich. 188; State v. Taylor, 10 Ohio, 378; Shelton v. Gill, 11 Ohio, 417; Orr v. Churchill, 1 H. Bl. 227, 232; Gray v. Crosby, 18 Johns. 219, 226; Foote v. Sprague, 13 Kan. 155. But see Lawrence v. Cowles, 13 Ill. 577; Gould v. Bishop Hill Colony, 35 Ill. 324. Within the bounds of the legal rate of interest, parties may liquidate damages for nonpayment of money when due. Hackenberry v. Shaw, 11 Ind. 392; Gully v. Remy, 1 Blackf. (Ind.) 69; Wakefield v. Beckley, 3 McCord (S. C.) 480; Daggett v. Pratt, 15 Mass. 177. See Richards v. Marshman, 2 G. Greene (Iowa) 217.

[53] This would depend on the language of the statute.

[54] Suth. Dam. § 282.

[55] Smith v. Bergengren, 153 Mass. 236, 26 N. E. 690.

an option. When this is the case, the damages for a breach are limited to compensation for the least beneficial alternative, on the theory that the parties must have contemplated that the defendant would choose to perform that one.[56] Where, however, the contract, instead of being to do one thing or another, is an absolute engagement to do a thing, and, if not, to pay a sum of money, the damages for not doing the thing are the sum of money.[57] In such a case, the party has no option,[58] and the agreement is one for liquidated damages, subject to the rules already explained. Where the contract is to do a certain thing or to pay a given sum of money, and the defendant has failed to do the thing, he is generally held to have had his election, and payment of the money may be enforced.[59]

[56] Sedg. Dam. § 421.

[57] Deverill v. Burnell, L. R. 8 C. P. 475; Stewart v. Bedell, 79 Pa. St. 336; People v. Central Pac. R. Co., 76 Cal. 29, 34, 18 Pac. 90; Crane v. Peer, 43 N. J. Eq. 553, 4 Atl. 72, collecting cases. But see Hahn v. Concordia Society, 42 Md. 460; City of Indianola v. Gulf, W. T. & P. Ry., 56 Tex. 594.

[58] Equity may enforce performance or enjoin a violation. Ayres v. Pease, 12 Wend. 393; Phenix Ins. Co. v. Continental Ins. Co., 14 Abb. Prac. (N. S.) 266; Long v. Bowring, 33 Beav. 585; Howard v. Hopkyns, 2 Atk. 371; Dike v. Greene, 4 R. I. 285; Dooley v. Watson, 1 Gray, 414; Gray v. Crosby, 18 Johns. 219; Sainter v. Ferguson, 7 C. B. 716; Hobson v. Trevor, 2 P. Wms. 191; Chilliner v. Chilliner, 2 Ves. Sr. 528; Ingledew v. Cripps, 2 Ld. Raym. 814; Sloman v. Walter, 1 Brown, Ch. 418; Lampman v. Cochran, 16 N. Y. 275; Ward v. Jewett, 4 Rob. (N. Y.) 714; Robeson v. Whitesides, 16 Serg. & R. (Pa.) 320; Robinson v. Bakewell, 25 Pa. St. 424; Cartwright v. Gardner, 5 Cush. (Mass.) 273; National Provincial Bank v. Marshall, 40 Ch. Div. 112.

[59] Pearson v. Williams' Adm'rs, 24 Wend. 244, 26 Wend. 630; Pennsylvania R. Co. v. Reichert, 58 Md. 261; Hodges v. King, 7 Metc. (Mass.) 583; Slosson v. Beadle, 7 Johns. 72; Allen v. Brazier, 2 Bailey (S. C.) 293. See, also, Morrell v. Insurance Co., 33 N. Y. 429; American Cent. Ins. Co. v. McLanathan, 11 Kan. 533 (option to pay loss or rebuild). This rule is difficult to reconcile with that of the least beneficial alternative. Its practical effect is to make an alternative contract one for liquidated damages, with this difference, that specific performance of a contract can be enforced, though it stipulate for liquidated damages, while, in alternative contracts, only the alternative chosen can be enforced. See Crane v. Peer, 43 N. J. Eq. 553, 558, 4 Atl. 72, and Suth. Dam. § 282. In Smith v. Bergengren, 153 Mass. 236, 26 N. E. 690, it was held that a covenant not to practice medicine in a certain town so long as the plaintiff should remain in practice there, but containing a provision that defendant might resume practice provided he would pay plaintiff a cer-

The form of an alternative contract cannot be used to disguise a stipulation for a penalty. If the real intent is to liquidate the damages or provide for a penalty, the intent will be enforced only so far as is compatible with the principles already explained.

tain sum, did not provide for either a penalty or liquidated damages. The sum named was a price fixed for what the contract permitted him to do if he paid.

CHAPTER V.

INTEREST.

59. Definition.
60. Interest as a Debt and as Damages.
61. General Rule.
62. Interest on Nonpecuniary Losses.
63. Pecuniary Losses—Liquidated Demands.
64. Pecuniary Losses—Unliquidated Demands.
65. Contracts.
66-67. Torts.
68. Condemnation Proceedings.
69. Defendant not Responsible for Delay.
70. Interest on Overdue Paper—Contract and Statute Rate.
71. Compound Interest.

DEFINITION.

59. Interest is the compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss thereof to the party entitled to its use.[1]

[1] Suth. Dam. § 300. "Interest is the value of the use of money; the amount of compensation for withholding money." Sedg. Dam. § 282; Loudon v. Taxing Dist., 104 U. S. 771; Minard v. Beans, 64 Pa. St. 411. "Interest is the compensation that one person gives for the use and profit of another's money, or the legal damage he is obliged to pay to another person who has lost the use of his money through the payor's act or negligence, although the payor may not have received any benefit therefrom." Perley, Interest, p. 1. "A contract to pay interest is a contract to pay a consideration for the future use of money. The contract in this case was a contract to pay a consideration for the past use of money, and therefore not a contract to pay interest in any proper or legal sense." Daniels v. Wilson, 21 Minn. 530. See, also, Davis v. Yuba Co., 75 Cal. 452, 13 Pac. 874, and 17 Pac. 533. The term "usury," as originally used, was synonymous with the modern term "interest." "Usury," as now used, means only the excess of interest above the legal rate allowed. The term "interest" is broad enough to include "usury."

INTEREST AS A DEBT AND AS DAMAGES.

60. In all cases where interest is recoverable, it is given either

(a) By contract, in which case it is a debt; or,

(b) By law, in which case it is given as damages.

The right to recover interest may arise out of a contract to pay it, or it may arise independently of contract. Where there is a contract for interest, such interest constitutes a debt, and is recoverable as such.[2] With this branch of the subject we are not specially concerned. Where interest is given by law, it is given as damages for delay in making compensation.

The English Doctrine.

By the ancient common law the taking of interest was absolutely prohibited in England,[3] but it was subsequently permitted by statute.[4] It is allowed now, as a matter of right, only when there is a contract, express or implied, for its payment.[5] It is allowed, in

[2] Hummel v. Brown, 24 Pa. St. 310.

[3] Hawk, bk. 1, c. 82; Hume, c. 33; Perley, Interest, p. 1; Suth. Dam. § 301. The habitual taking of interest was punished as a crime, and the offender's estate was forfeited to the king. Houghton v. Page, 2 N. H. 42; Chesterfield v. Jansen, 1 Wils. 286–290. In Mirror of Justice, 191, 248, published before the Norman Conquest, it is lamented as "an abusion of the common law" that the offender was not likewise deprived of Christian burial.

[4] 37 Hen. VIII. c. 9 (1545). This statute limited the rate to 10 per cent., and thus negatively authorized interest. Under this statute the first lawful interest was taken in England. "Before the statute of Henry VIII., all interest on money lent was prohibited by the canon law, as it is now in Roman Catholic countries." Per Lord Mansfield in Lowe v. Waller, Doug. 736, 740; President, etc., Rensselaer Glass Factory v. Reid, 5 Cow. 587, 608, per Mr. Senator Spencer, dissenting. 12 Anne, St. 2, c. 16, reduced the rate to 5 per cent. Various statutes establishing different rates had been passed between the dates of these two statutes. See note in 2 Pars. Notes & B. 391. By 17 & 18 Vict. c. 90, all the laws against usury were repealed, leaving parties at liberty to contract for any rate of interest.

[5] Higgins v. Sargent, 2 Barn. & C. 348; Shaw v. Picton, 4 Barn. & C. 715, 723; Page v. Newman, 9 Barn. & C. 378, disapproving Arnott v. Redfern, 3 Bing. 353.

the discretion of the jury, as damages, only in cases provided for by statute, and as special damages for the detention of money.

Same—Interest by Agreement.

Where there is an express agreement to pay interest, there is, of course, no difficulty in its allowance. It was held at an early day that, where there was an agreement to obtain money at a specific time, the law would imply an agreement to pay interest after that time, if there was a default.[6] "Where money is made payable by an agreement between the parties, and a time given for the payment of it, this is a contract to pay the money at the given time, and to pay interest for it from the given day in case of failure of payment at that day."[7] But this rule has not been followed in the later cases.[8] An agreement to pay interest may be implied from the custom or usage of the business in which the debt is contracted.[9] There

[6] Blaney v. Hendricks, 2 W. Bl. 761, 3 Wils. 205; Shipley v. Hammond, 5 Esp. 114; Chalie v. Duke of York, 6 Esp. 45.

[7] Robinson v. Bland, 2 Burrows, 1077, 1086. See, also, Boddam v. Riley, 2 Brown, Ch. 2; Mountford v. Willes, 2 Bos. & P. 337.

[8] See Mayne, Dam. § 181. The principle seems admitted by Lord Ellenborough in Salton v. Bragg, 15 East, 223, 226, and in De Havilland v. Bowerbank, 1 Camp. 50. But in Gordon v. Swan, 2 Camp. 429, note, 12 East, 419, he limited his language in the De Havilland Case to written instruments in the nature of bills or notes. In De Bernales v. Fuller, 2 Camp. 426, he said that, where there was no contract, express or implied, to pay interest, it could not be allowed. He reiterated the rule stated by him in the De Havilland Case. In Higgins v. Sargent, 2 Barn. & C. 348, 351, 352, Holroyd, J., said: "Unless interest be payable by the consent of the parties, express, or implied from the usage of trade (as in case of bills of exchange) or other circumstances, it is not due by common law. * * * Independently of these authorities I am of opinion, upon the principles of the common law, that interest is not payable upon a sum certain payable at a given day." In Page v. Newman, 9 Barn. & C. 378–381, Lord Tenterden stated the rule to be that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade. Speaking of interest, it has been well said: "It would fortunately be a very difficult matter to fix upon another point of English law on which the authorities are so little in harmony with each other." De Havilland v. Bowerbank, 1 Camp. 50–53.

[9] Eddowes v. Hopkins, 1 Doug. 376; Selleck v. French, 1 Conn. 32; Moore v. Voughton, 1 Starkie, 487.

is an implied agreement to pay interest on mercantile securities, arising out of the custom of merchants.[10]

Same—Interest as Damages.

It was early settled that, where commercial paper was not paid at maturity, interest thereafter accruing could only be recovered by way of damages unless it was provided for by the terms of the note or bill.[11] "Until the maturity of the bill, the interest is a debt. After its maturity, the interest is given as damages at the discretion of the jury."[12] This is now well established.[13] The allowance of interest as damages is governed in England by the statute of 3 & 4 Wm. IV. c. 42, §§ 28, 29. In all cases it is within the discretion of the jury. Independently of this statute, interest is allowed as special damages for the detention of money, but it must be specially pleaded.[14]

The American Doctrine.

In America the prevailing doctrine is that the right to interest is given by the common law.[15] Interest is usually considered as a necessary and natural incident of money, and a person is regarded

[10] Wood's Mayne, Dam. p. 214.

[11] Du Belloit v. Lord Waterpark, 1 Dow & R. 16; Dent v. Dunn, 3 Camp. 296. In Cameron v. Smith, 2 Barn. & Ald. 305–308, it was held that, "although by the usage of trade interest is allowed on a bill, yet it constitutes no part of the debt, but is in the nature of damages, which must go to the jury, in order that they may find the amount." If this language applies to interest accruing before maturity, it is hard to understand the principle. In re Burgess, 2 Moore, 745, was a similar case, but the bill had matured and been dishonored. The interest was held to be in the nature of damages.

[12] Keene v. Keene, 3 C. B. (N. S.) 144.

[13] In re Burgess, 2 Moore, 745; Ex parte Charman, Wkly. Notes (1887) 184; De Havilland v. Bowerbank, 1 Camp. 50; Higgins v. Sargent, 2 Barn. & C. 348; Page v. Newman, 9 Barn. & C. 378. But see Blaney v. Hendricks, 2 W. Bl. 761; Parker v. Hutchinson, 3 Ves. 133; Lowndes v. Collens, 17 Ves. 27.

[14] Watkins v. Morgan, 6 Car. & P. 661; Price v. Railway Co., 16 Mees. & W. 244; Cameron v. Smith, 2 Barn. & Ald. 305; Cook v. Fowler, L. R. 7 H. L. 27.

[15] Where there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account. Young v. Godbe, 15 Wall. 562; Young v. Polack, 3 Cal. 208.

as entitled to it as a matter of right whenever money is wrongfully detained.[16] In some states, however, it is held that the common law gives no right to interest, but merely allows the parties to contract for it, and that, unless the right to it is given by contract or by statute, it cannot be recovered.[17] In all the states, however, the matter of interest is largely regulated by statute.

Same—Interest as a Debt.

Here, as in England, interest is always properly chargeable where there is either an express or an implied agreement to pay it; and an agreement to that effect will be implied where there was a custom to charge interest, which was known to the defendant.[18]

[16] Sedg. Dam. § 292. The early cases are collected and discussed in Wood v. Robbins, 11 Mass. 504; Pope v. Barrett, 7 Mason, 117, Fed. Cas. No. 11,273; Boyd v. Gilchrist, 15 Ala. 849; Davis v. Greely, 1 Cal. 422.

[17] Parmelee v. Lawrence, 48 Ill. 331; Sammis v. Clark, 13 Ill. 544; Hitt v. Allen, Id. 592; City of Chicago v. Allcock, 86 Ill. 384; Denver, S. P. & P. R. Co. v. Conway, 8 Colo. 1, 5 Pac. 142; Hamer v. Kirkwood, 25 Miss. 95; Board of Sup'rs of Warren Co. v. Klein, 51 Miss. 807; Kenney v. Hannibal & St. J. R. Co., 63 Mo. 99; Marshall v. Schrieker, Id. 308; Atkinson v. Atlantic & P. R. Co., Id. 367; De Steiger v. Hannibal & St. J. R. Co., 73 Mo. 33; Kimes v. St. Louis, I. M. & S. Ry. Co., 85 Mo. 611; Randall v. Greenhood, 3 Mont. 506; Flannery v. Anderson, 4 Nev. 437. In Close v. Fields, 2 Tex. 232, it was held that the right to interest rested wholly on statute. The statutes of many states allow interest when money is vexatiously withheld. City of Chicago v. Allcock, 86 Ill. 384; Chicago & N. W. R. Co. v. Schultz, 55 Ill. 421; Bradley v. Geiselman, 22 Ill. 494. Whether it was so withheld is a question for the jury. Devine v. Edwards, 101 Ill. 138. Merely defending a suit is not vexatious delay in payment of money. Aldrich v. Dunham, 16 Ill. 403. Interest runs from the time payment was due, not from the time the delay became vexatious. City of Chicago v. Tebbetts, 104 U. S. 120.

[18] Ayers v. Metcalf, 39 Ill. 307; Veiths v. Hagge, 8 Iowa, 163; M'Allister v. Reab, 4 Wend. 483, 8 Wend. 109; Meech v. Smith, 7 Wend. 315; Rayburn v. Day, 27 Ill. 46; Dickson v. Surginer, 3 Brev. 417; Fisher v. Sargent, 10 Cush. 250; Knox v. Jones, 2 Dall. 193; Bispham v. Pallock, 1 McLean, 411, Fed. Cas. No. 1,442; Koons v. Miller, 3 Watts & S. 271; Watt v. Hoch, 25 Pa. St. 411; Adams v. Palmer, 30 Pa. St. 346. Under a statute providing that no more than a certain rate shall be recovered on all contracts, express or implied, for the payment of money, unless expressly stipulated for by the parties, an agreement cannot be implied to pay more than the statutory rate. Turner v. Dawson, 50 Ill. 85.

Same—Interest as Damages.

By the earlier cases it was held that the allowance of interest as damages was discretionary with the jury.[19] This was especially true in actions of tort,[20] but the rule was also applied in actions of contract.[21] The court was thought to have the same discretion as the jury. In a leading case[22] it was said: "As often as the question of interest has been before a court, the judges seem to have considered it as depending on general equitable principles, and, in most cases, to have decided each case in reference to its particular circumstances, without attempting to give any rule which might be generally applicable." Gradually, however, and in a continually increasing number of cases, interest came to be allowed as a matter of law, and this is now the rule in many classes of cases.[23] Where

[19] Sedg. Dam. § 295; McIlvaine v. Wilkins, 12 N. H. 474.

[20] It was so in trespass. Beals v. Guernsey, 8 Johns. 446. And in trover. Hyde v. Stone, 7 Wend. 354; Bissell v. Hopkins, 4 Cow. 53; Kennedy v. Strong, 14 Johns. 128; Hallett v. Novion, 14 Johns. 273, 16 Johns. 327; Devereux v. Burgwin, 11 Ired. 490. And in replevin. Rowley v. Gibbs, 14 Johns. 385. And in actions for negligence. Thomas v. Weed, 14 Johns 255. Or for fraudulent refusal to convey land. Handley v. Chambers, 1 Litt. (Ky.) 358.

[21] Dox v. Dey, 3 Wend. 356; Gilpins v. Consequa, Pet. C. C. 85, Fed. Cas. No. 5,452; Watkinson v. Laughton, 8 Johns. 213; Amory v. McGregor, 15 Johns. 24; Letcher v. Woodson, 1 Brock. 212, Fed. Cas. No. 8,280; Dotterer v. Bennett, 5 Rich. Law, 295. And, generally, it was held that interest was discretionary with the jury. Willings v. Consequa, Pet. C. C. 172, Fed. Cas. No. 17,766; Oakes v. Richardson, 2 Low. 173, Fed. Cas. No. 10,390; Crow v. State, 23 Ark. 684; Brady v. Wilcoxson, 44 Cal. 239; Rogers v. West, 9 Ind. 400; Morford v. Ambrose, 3 J. J. Marsh. 688; Marshall v. Dudley 4 J. J. Marsh. 244; Bell's Adm'rs v. Logan, 7 J. J. Marsh. 593; Stark's Adm'r v. Price, 5 Dana, 140; Howcott v. Collins, 23 Miss. 398; Richmond v. Bronson, 5 Denio, 55; Hunt v. Jucks, 1 Hayw. (N. C.) 199; Hogg v. Manufacturing Co., 5 Ohio, 410; Obermyer v. Nichols, 6 Bin. 159, Heidenheimer v. Ellis, 67 Tex. 426, 3 S. W. 666; Close v. Fields, 13 Tex. 623.

[22] Rensselaer Glass Factory v. Reid, 5 Cow. 587, 596.

[23] Lewis v. Rountree, 79 N. C. 122, 128; Dana v. Fiedler, 12 N. Y. 40–50; Broughton v. Mitchell, 64 Ala. 210; Hamer v. Hathaway, 33 Cal. 117; Andrews v. Durant, 18 N. Y. 496; De Lavallette v. Wendt, 75 N. Y. 579; Robinson v. Insurance Co., 1 Abb. Prac. (N. S.) 186; Wehle v. Butler, 43 How. Prac. 5; Rhemke v. Clinton, 2 Utah, 230.

interest is given as damages for the nonpayment or detention of money, it is an inseparable incident of the principal demand. It can only be recovered with the principal by action. It does not constitute a debt capable of a distinct claim. Whenever the principal demand is satisfied or discharged, the accrued interest, whether paid or not, is extinguished.[24] Interest as damages is given at the statutory rate.[25] Where no rate is fixed by statute, it is given at the customary rate.[26] Where the statutory rate is changed after interest begins to accrue, interest accrues thereafter at the new rate.[27] In an action on a foreign judgment, it has been held that interest should be given at the domestic rate,[28] whether the judgment bore interest by the foreign law or not. But it is sometimes held that, if the foreign rate is not proved, it will be presumed to be the same as the domestic rate.[29] In an action on a contract, [30] interest should be given at the rate of the place of performance, or of the place

[24] Suth. Dam. § 300; Dixon v. Parkes, 1 Esp. 110; Churcher v. Stringer, 2 Barn. & Adol. 777; Cutter v. Mayor, etc., of New York, 92 N. Y. 166; Hamilton v. Van Rensselaer, 43 N. Y. 244; Devlin v. City of New York, 60 Hun, 68, 14 N. Y. Supp. 251; Hayes v. Railway Co., 64 Iowa, 753, 19 N. W. 245; Southern Cent. R. Co. v. Town of Moravia, 61 Barb. 181; Consequa v. Fanning, 3 Johns. Ch. 364; Gillespie v. Mayor, etc., of New York, 3 Edw. Ch. 512; Jacot v. Emmett, 11 Paige, 142; Succession of Mann, 4 La. Ann. 28; Succession of Anderson, 12 La. Ann. 95; American Bible Soc. v. Wells, 68 Me. 572; Tenth Nat. Bank v. Mayor, etc., of New York, 4 Hun, 429. Where interest is secured by contract, an action may be maintained for it, although the principal has been paid. Robbins v. Cheek, 32 Md. 328; Stone v. Bennett, 8 Mo. 41; Fake v. Eddy's Ex'r, 15 Wend. 76; King v. Phillips, 95 N. C. 245.

[25] Wegner v. Bank, 76 Wis. 242, 44 N. W. 1096.

[26] Davis v. Greely, 1 Cal. 422; Perry v. Taylor, 1 Utah, 63.

[27] White v. Lyons, 42 Cal. 279; Woodward v. Woodward, 28 N. J. Eq. 119; Wilson v. Cobb, 31 N. J. Eq. 91; In re Doremus' Estate, 33 N. J. Eq. 234; Mayor, etc., of Jersey City v. O'Callaghan, 41 N. J. Law, 349; Reese v. Rutherford, 90 N. Y. 644; Sanders v. Railway Co., 94 N. Y. 641; O'Brien v. Young, 95 N. Y. 428; Stark v. Olney, 3 Or. 88.

[28] Parker v. Thompson, 3 Pick. 429; Barringer v. King, 5 Gray, 9; Hopkins v. Shepard, 129 Mass. 600; Nelson v. Felder, 7 Rich. Eq. 395.

[29] Crone v. Dawson, 19 Mo. App. 214; Pauska v. Dans, 31 Tex. 67; Porter v. Munger, 22 Vt. 191.

[30] Pana v. Bowler, 107 U. S. 529, 2 Sup. Ct. 704; Sutro Tunnel Co. v. Segregated Belcher Min. Co., 19 Nev. 121, 7 Pac. 271.

where the contract was made.[31] But it has been held that interest on overdue coupons should be given at the rate of the place where the action was brought.[32]

GENERAL RULE.

61. Interest should be allowed as damages whenever it represents a loss proximately caused by defendant's wrong.

It is extremely difficult to frame any rule governing the allowance of interest as damages, for the reason that the law has been in a constant state of evolution during the last 100 years, and the result reached in different jurisdictions is not yet the same. Perhaps much of the confusion in the cases has been caused by the unfortunate use of the term "interest" to indicate both interest as a debt and compensatory damages for delay, measured by the rate of interest. The contest has been whether an allowance should be made for the delay. The name by which it should be called received but little attention, and it was incautiously said that interest should or should not be allowed. The distinction however is important. "Interest [as a debt] is recoverable of right, but compensation for deferred payments in torts depends upon the circumstances of each case. The plaintiff may have set his damages so inordinately high as to have justified the defendant in refusing to pay; or in other ways the delay may be plaintiff's fault; or the liability of defendant may have arisen without fault, as in Weir v. Allegheny Co.[33] In such cases the jury probably would not, and certainly ought not, to make the allowance."[34] The failure to appreciate the true nature of interest allowed as damages for delay led to the idea, often expressed in the early cases, that interest could not be allowed unless there was a contract, express or implied, to pay it. Thus in Dodge

[31] Gibbs v. Fremont, 9 Exch. 25; Courtois v. Carpentier, 1 Wash. C. C. 376, Fed. Cas. No. 3,286; French v. French, 126 Mass 360; Pauska v. Dans, 31 Tex. 67; Porter v. Munger, 22 Vt. 191.

[32] Fauntleroy v. Hannibal, 5 Dill. 219, Fed. Cas. No. 4,692.

[33] 95 Pa. St. 413.

[34] Richards v. Gas Co., 139 Pa. St. 37, 18 Atl. 600.

v. Perkins[35] it was said: "If the interest is not included in the contract, it cannot be given. If it is included, then it should make up a part of the judgment." The cases are by no means unanimous in the support of any theory as to the allowance of interest as damages. The theory most consistent with the principles upon which the whole law of damages rests seems to be that interest is allowed as damages on the same principle that all damages are awarded,—that is, as compensation for losses proximately caused by defendant's wrong.

SAME—INTEREST ON NONPECUNIARY LOSSES.

62. Interest is never recoverable in actions where the elements of injury are nonpecuniary.

In cases where the elements of injury are nonpecuniary, interest as damages cannot be recovered. This is true in such actions as assault and battery, personal injury, libel and slander, etc. The reason for denying interest in this class of cases was clearly stated in an action for personal injury. The court said: "The rule for determining damages for injuries not resulting in death, where the statute fixes the measure, and not calling for exemplary punishment, is that of compensation for mental suffering and physical pain, loss of time, and expenses incident to the injury, and, if it be permanent, the loss resulting from complete or partial disability, in health, mind, or person, thereby occasioned. * * * As this sum in gross includes all the compensation which is requisite to cover pain, suffering, and disability, to date of judgment and prospectively beyond, it is intended to be, and is, the full measure of recovery, and cannot be supplemented by the new element of damages for the detention of this sum from the date of the injury. The measure of damages being thus fixed, it is expected that, in determining it, juries and courts will make the sum given in gross a fair and just compensation, and one in the full amount proper to be given when rendered, whether soon or late after the injury; as, if given soon, it looks to continuing and suffering disability, just as, when given late, it includes that of the past. It is obvious that damages could not

[35] 9 Pick. 368, 384.

be given for pain and suffering and disability experienced on the very day of trial, and then interest added for years before. These are the items considered to make up the aggregate then due, and the gross sum then for the first time ascertained."[36] Interest, of course, cannot be allowed on exemplary damages.*

SAME—PECUNIARY LOSSES—LIQUIDATED DEMANDS.

63. Interest is always recoverable in an action for the detention of money or the nonpayment of liquidated demands.

Interest may be recovered in an action for the detention of money or the nonpayment of a liquidated demand, as a matter of right. Indeed, as has been seen, interest at the legal rate is the measure of damages in such cases, because the loss of such interest is the only proximate and certain result of the wrong. When a liquidated sum is due at a specific time, and is not then paid, through the debtor's fault, the American common law awards compensation in damages for the wrong. This is the money together with the value of its use, which is legal interest upon it during the time the defendant is in fault.[37] Interest is given as damages for the detention of

[36] Louisville & N. R. Co. v. Wallace, 91 Tenn. 35, 17 S. W. 882.

* Ratteree v. Chapman, 79 Ga. 574, 4 S. E. 684.

[37] Curtis v. Innerarity, 6 How. 146; Whitworth v. Hart, 22 Ala. 343; Cheek v. Waldrenn, 25 Ala. 152; Flinn v. Barber, 64 Ala. 193; Broughton v. Mitchell, Id. 210; Caldwell v. Dunklin, 65 Ala. 461; Talladego Ins. Co. v. Peacock, 67 Ala. 253; Park v. Wiley, Id. 310; Peoria M. & F. Ins. Co. v. Lewis, 18 Ill. 553; Clark v. Dutton, 69 Ill. 521; Harper v. Ely, 70 Ill. 581; Dobbins v. Higgins, 78 Ill. 440; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Stern v. People, 102 Ill. 540; Hall v. Huckins, 41 Me. 574; Newson's Adm'r v. Douglass, 7 Har. & J. 417; Judd v. Dike, 30 Minn. 380, 15 N. W. 672; Buzzell v. Snell, 25 N. H. 474; Stuart v. Binsse, 10 Bosw. 436; Gutta Percha & Rubber Manuf'g Co. v. Benedict, 37 N. Y. Super. Ct. 430; Spencer v. Pierce, 5 R. I. 63; Hauxhurst v. Hovey, 26 Vt. 544; Sampson v. Warner, 48 Vt. 247; Butler v. Kirby, 53 Wis. 188, 10 N. W. 373; Foote v. Blanchard, 6 Allen, 221 Interest is recoverable on legacies. Custis v. Adkins, 1 Houst. 382; Hennion's Ex'rs v. Jacobus, 27 N. J. Eq. 28; Vermont State Baptist Convention v. Ladd, 58 Vt. 95, 4 Atl. 631. "Whenever the debtor knows precisely what he is to pay and when he is to pay, he shall be charged with interest if he

the debt.[38] The time the money is due fixes the time of default from which interest runs. Where a sum certain is payable at a particular time, it is the debtor's duty to pay it at that time; and, if he does not, he is in default, and liable for interest.[39] Where

neglects to pay." People v. County of New York, 5 Cow. 331–334. "Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt, or as compensation for a breach of duty, or for the failure to keep a contract, interest attaches as an incident." State v. Lott, 69 Ala. 147, 155. Where a contract provides for liquidated damages, interest is recoverable on the stipulated amount from the date of the breach. Mead v. Wheeler, 13 N. H. 351; Little v. Banks, 85 N. Y. 258; Winch v. Ice Co., 86 N. Y. 618. But see Yellow Pine Lumber Co. v. Carroll, 76 Tex. 135, 13 S. W. 261 Interest is recoverable on the amount due on an insurance policy. Field v. Insurance Co., 6 Biss. 121, Fed. Cas. No. 4,767; Swanscot Mach. Co. v. Partridge, 25 N. H. 369, 380. Cf. Higgins v. Sargent, 2 Barn. & C. 348. Interest is recoverable on a note, after maturity, though it did not bear interest by its terms. Gibbs v Fremont, 9 Exch. 25; Kitchen v. Bank, 14 Ala. 233; Swett v. Hooper, 62 Me. 54. Where a note reserves usurious interest, which is forfeited by statute, legal interest is recoverable after maturity. Fisher v. Bidwell, 27 Conn. 363.

[38] Mounson v. Redshaw, 1 Saund. 196–201, note; Osbourne v. Hosier, 6 Mod. 167; Williams v. Bank, 1 Gilman, 667; North River Meadow Co. v. Christ Church, 22 N. J. Law, 425; Sayre v. Austin, 3 Wend. 496; Sumner v. Beebe, 37 Vt. 562.

[39] A municipal corporation need not seek its creditors, and is therefore not in default until payment is demanded, and no interest can be recovered until that time. Paul v. Mayor, etc., of New York, 7 Daly, 144; Yellowby v. Commissioners, 73 N. C. 164. In Wheeler v. County of Newberry, 18 S. C. 132, and Ashe v. County of Harris, 55 Tex. 49, it was held that municipal corporations were not liable for interest at all, in the absence of contract or statute. The same result was reached in Illinois and Mississippi by interpretation of the statutes. City of Pekin v. Reynolds, 31 Ill. 529; City of Chicago v. People, 56 Ill. 327; Board of Sup'rs of Warren Co. v. Klein, 51 Miss. 807; Board of Sup'rs of Clay Co. v. Board of Sup'rs of Chickasaw Co., 64 Miss. 534, 1 South. 753. And in Pennsylvania it is held that debts are not payable until there are funds on hand, as debts are payable only out of taxes. Allison v. Juniata Co., 50 Pa. St. 351. The state is not liable for interest. Whitney v. State, 52 Miss. 732. In some jurisdictions interest is allowed on claims against municipal corporations after demand. Robbins v. Lincoln Co. Court 3 Mo. 57; Risley v. Andrew Co., 46 Mo. 582; Paul v. Mayor, etc., of New York, 7 Daly, 144; Yellowby v. Commissioners of Pitt Co., 73 N. C. 164. And see Jacks v. Turner, 36 Ark. 89. Where for any reason the defendant is not responsible for the delay in payment he is not chargeable with interest. Thus

money is due on demand, interest runs from the time of demand; and the bringing of an action is a demand. Where the defendant's own act makes a demand useless or impossible, interest may be recovered from the date of such act.

tender of a sufficient amount will stop the accruing of interest, even in actions of tort. Thompson v. Boston & M. R., 58 N. H. 524. Where the debtor is forbidden by law to pay the debt, he is not liable for interest during the delay. Thus trustee process or injunction will interrupt the running of interest. Le Grange v. Hamilton, 4 Term R. 613; Hamilton v. Le Grange, 2 H. Bl. 144; Osborn v. Bank, 9 Wheat. 738; Bainbridge v. Wilcocks, Baldw. 536, Fed. Cas. No. 755; Willings v. Consequa, Pet. C. C. 172, 301, Fed. Cas. Nos. 17,766, 17,767; Norris v. Hall, 18 Me. 332; Oriental Bank v. Tremont Ins. Co. 4 Metc. (Mass.) 1; Bickford v. Rich, 105 Mass. 340; Huntress v. Burbank, 111 Mass. 213; Smith v. Flanders, 129 Mass. 322; Le Branthwait v. Halsey, 9 N. J. Law, 3; Kellogg v. Hickok, 1 Wend. 521; Stevens v. Barringer, 13 Wend. 639; Fitzgerald v. Caldwell, 2 Dall. 215, 1 Yeates, 274; Jackson's Ex'rs v. Lloyd, 44 Pa. St. 82. In some states a garnishee or person enjoined must bring the money into court, or he will be chargeable with interest. Kirkman v. Vanlier, 7 Ala. 217; Godwin v. McGehee, 19 Ala. 468; Bullock v. Ferguson, 30 Ala. 227; Curd v. Letcher, 3 J. J. Marsh. 443; Smith v. Bank, 60 Miss. 69. Candee v. Webster, 9 Ohio St. 452; Templeman v. Fauntleroy, 3 Rand. (Va.) 434. If the garnishee denies his indebtedness, or is in collusion with either party, he is liable for interest. Work v. Glaskins, 33 Miss. 539; Stevens v. Gwathmey, 9 Mo. 636; Rushton v. Rowe, 64 Pa. St. 63; Jones v. Manufacturers' Nat. Bank, 99 Pa. St. 317. So, also, if he actually used the money. Mattingly v. Boyd, 20 How. 128; Norris v. Hall, 18 Me. 332. In such case interest is allowed at the market rate, not the statutory rate. Greenish v. Standard Sugar Refinery, 2 Low. 553, Fed. Cas. No. 5,776. Interest as damages does not accrue in time of war, where the debtor is in one hostile country and the creditor in the other. Interest accruing by contract is not affected. Hoare v. Allen, 2 Dall. 102; Foxcraft v. Nagle, Id. 132; Bigler v. Waller, Chase, 316, Fed. Cas. No. 1,404; Mayer v. Reed, 37 Ga. 482; Selden v. Preston, 11 Bush, 191; Bordley v. Eden, 3 Har. & McH. 167; Brewer v. Hastie, 3 Call, 22; Lash v. Lambert, 15 Minn. 416 (Gil. 336); Brown v. Hiatts, 15 Wall. 177. If the creditor has an agent in the same country with the debtor, interest does not cease; for it is the debtor's duty to pay the agent. Ward v. Smith, 7 Wall. 447; Conn v. Penn, Pet. C. C. 496, Fed. Cas. No. 3,802; Denniston v. Imbrie, 3 Wash. C. C. 396, note, Fed. Cas. No. 3,104. And see Bean v. Chapman, 62 Ala. 58. Generally, as to what will relieve a debtor from interest, see Miller v. Bank of New Orleans, 5 Whart. 503; Redfield v. Ystalyfera Iron Co., 110 U. S. 174, 3 Sup. Ct. 570; Bartells v. Redfield, 27 Fed. 286; Stewart v. Schell, 31 Fed. 65; Jane v. Hagen, 10 Humph. 332. Where the happening of an event upon which a debt was to become due was unknown to defendant,

Money Wrongfully Acquired or Used.

Where one acquires money to which he has no right, it is his duty to pay it over immediately; and, if he fails to do so, he is charge-

but was not within the special knowledge of plaintiff, the defendant is nevertheless liable for interest. Sumner v. Beebe, 37 Vt. 562.

INTEREST ON TAXES. Interest is not recoverable on delinquent taxes, in the absence of statute. Perry Co. v. Selma, M. & M. R. Co., 65 Ala. 391; Perry v. Washburn, 20 Cal. 318, 350; Danforth v. Williams, 9 Mass. 324. Where one wrongfully enjoins the collection of taxes from himself, he is liable for interest. Rosenberg v. Weekes, 67 Tex. 578, 4 S. W. 899. It has been held that interest is not recoverable on the quota of taxes due from a county to the state. State v. Multnomah Co., 13 Or. 287, 10 Pac. 635. Contra, State v. Van Winkle, 43 N. J. Law, 125. Interest is recoverable on special taxes assessed against abutting owners for street improvements. Gest v. City of Cincinnati, 26 Ohio St. 275.

FINES AND PENALTIES. Interest is not recoverable on fines and penalties. State v. Steen, 14 Tex. 396; Higley v. First Nat. Bank, 26 Ohio St. 75. A statute allowing the highest market value of property destroyed between the time of destruction and the trial provides for a penalty, and interest is not recoverable. Smith v. Morgan, 73 Wis. 375, 41 N. W. 532; Central Railroad & Banking Co. v. Atlantic & G. R. Co., 50 Ga. 444; Ware v. Simmons, 55 Ga. 94.

INTEREST ON JUDGMENTS. It is usually held that interest is recoverable in an action of debt on a judgment, regardless of whether the original demand carried interest or not. Klock v. Robinson, 22 Wend. 157. It is held in some states to be recoverable by common law. Perkins v. Fourniquet, 14 How. 328, 331; Crawford v. Simonton's Ex'rs, 7 Port (Ala.) 110; Gwinn v. Whitaker's Adm'x, 1 Har. & J. 754; Hodgdon v. Hodgdon, 2 N. H. 169; Mahurin v. Bickford, 6 N. H. 567; Harrington v. Glenn, 1 Hill (S. C.) 79; Nelson v. Felder, 7 Rich. Eq. 395; Beall v. Silver, 2 Rand. (Va.) 401; Mercer's Adm'r v. Beale, 4 Leigh, 189; Booth v. Ableman, 20 Wis. 602. It is recoverable by statute. Dougherty v. Miller, 38 Cal. 548; Brigham v. Vanbuskirk, 6 B. Mon. 197; Todd v. Botchford, 86 N. Y. 517; Coles v. Kelsey, 13 Tex. 75; Hagood v. Aikin, 57 Tex. 511. It was held not recoverable, without statute, in Reece v. Knott, 3 Utah, 451, 24 Pac. 757. See, also, Guthrie v. Wickliffs, 4 Bibb, 541; Cogswell's Heirs v. Lyon, 3 J. J. Marsh. 38. A levy on a judgment or a scire facias cannot include interest, in the absence of statute. Perkins v. Fourniquet, 14 How. 328, 331; Solen v. Virginia & T. R. Co., 14 Nev. 405; Barron v. Morrison, 44 N. H. 226; Watson v. Fuller, 6 Johns. 283; Mann's Ex'rs v. Taylor, 1 McCord, 171; Williamson v. Broughton, 4 McCord, 212; Hall v. Hall, 8 Vt. 156.

INTEREST BETWEEN VERDICT AND JUDGMENT. Interest between verdict and judgment is regulated by statute in almost all jurisdictions. Va-

able with interest.[40] Where one lawfully acquires money belonging to another, but improperly converts it to his own use, or withholds it after it is his duty to pay it over, he is liable for interest from the time of its conversion or detention.

SAME—PECUNIARY LOSSES—UNLIQUIDATED DEMANDS.

64. In actions where the injury is wholly pecuniary, interest is recoverable as of right, whether the loss is liquidated or unliquidated.

EXCEPTION—In many jurisdictions, where the loss is unliquidated, interest is discretionary with the jury.

In all cases, either of tort or contract, where the loss is wholly pecuniary, and may be fixed as of a definite time, interest should be allowed as a matter of right, whether the loss is liquidated or unliquidated. Into these cases the element of time enters as an important factor, and the plaintiff will not be fully compensated unless he receive, not only the value of what he has lost, but receive it as nearly as may be as of the date of his loss. Hence, additional damages in the nature of interest for the lapse of time should be allowed. It is never interest as such, but compensation, for the delay of which the rate of interest affords the fair legal measure.[41] It has been seen that interest is universally allowed in actions for nonpayment of liquidated demands. It is in the case of unliquidated

rious rules prevail. See Hallum v. Dickinson, 47 Ark. 120, 14 S. W. 477; Baltimore City Pass. Ry. Co. v. Sewell, 37 Md. 443; Lord v. Mayor, etc., of City of New York, 3 Hill, 426; Henning v. Van Tyne, 19 Wend. 101; Kelsey v. Murphy, 30 Pa. St. 340; Norris v. City of Philadelphia, 70 Pa. St. 332; Dowell v. Griswold, 5 Sawy. 23, Fed. Cas. No. 4,040; Swails v. Cissna, 61 Iowa, 693, 17 N. W. 39; Irvin v. Hazleton, 37 Pa. St. 465; Gibson v. Cincinnati Enquirer, 2 Flip. 88, Fed. Cas. No. 5,391; Com. v. Boston & M. R. Co., 3 Cush. 25; Johnson v. Atlantic & St. L. R. Co., 43 N. H. 410; McLimans v. City of Lancaster, 65 Wis. 240, 26 N. W. 566; McKim v. Blake, 139 Mass. 593, 2 N. E. 157.

ON APPEAL. Interest is often allowed as damages for a frivolous or vexatious appeal. Its allowance is regulated by statute.

[40] Interest is recoverable on money obtained by false representations. Arthur v. Wheeler & Wilson Manuf'g Co., 12 Mo. App. 335.

[41] Richards v. Gas Co., 130 Pa. St. 37, 18 Atl. 600.

demands that the greatest confusion and uncertainty is met with. The confusion arises from the idea that the allowance of interest as damages proceeds on the theory that defendant is in default for not paying without delay. Thus it is said: "Interest is denied when the demand is unliquidated, for the reason that the person liable does not know what sum he owes, and therefore cannot be in default for not paying." [42] The reason given has no relevancy to the question at issue. It may be conceded that, where defendant is not responsible for the delay, he cannot justly be charged with interest. But if one causes a loss which is in its nature unliquidated, and which must therefore be submitted to a jury, he is clearly liable for the necessary delay. The damages caused by such delay are clearly a proximate result of the original wrong. These damages are measured by the rate of interest, and the wrongdoer is clearly liable on principle. Interest, as damages, is given as compensation for loss suffered by the detention of money, and the loss suffered is equally great whether the demand is liquidated or unliquidated. Thus it was said, by the Massachusetts court, in an action for the negligent destruction of property: "We have heard no reason suggested why, if a plaintiff has been prevented from having his damages ascertained, and in that sense has been kept out of the sum that would have made him whole at the time, so long that that sum is no longer an indemnity, the jury, in their discretion, and as incident to determining the amount of the original loss, may not consider the delay caused by the defendant. In our opinion, they may do so; and, if they do, we do not see how they can do it more justly than by taking interest on the original damage as a measure." [43] The New York court said, in an action of nondelivery of goods sold: "Interest is a necessary item in the estimate of damages in this class of cases. The party is entitled, on the day of performance, to the property agreed to be delivered. If it is not delivered, the law gives, as the measure of compensation then due, the difference between the contract and market prices. If he is not also entitled to interest from that time, as a matter of law, this contradictory result follows: that, while an indemnity is professedly given, the law adopts such a mode of ascertaining its amount that, the longer a party is delayed

[42] Suth. Dam. § 347.

[43] Frazer v. Carpet Co., 141 Mass. 127, 4 N. E. 620.

in obtaining it, the greater shall its inadequacy become. It is, however, conceded to be law that, in these cases, the jury may give interest, by way of damages, in their discretion. Now, in all cases, unless this be an exception, the measure of damages, in an action upon a contract relating to money or property, is a question of law, and does not at all rest in the discretion of the jury." [44]

It would seem too clear for argument that, where interest is a necessary part of complete or even approximate indemnity, the injured person should be entitled to it as a matter of law, and it should not be left to the discretion of a jury. The measure of damages is in all cases a matter of law, though, where the injury is nonpecuniary, the jury necessarily determines the amount. The decisions are far from harmonious, however, in this class of cases. In many jurisdictions the allowance of interest is still held to be within the discretion of the jury. In some jurisdictions it may depend upon the form of action. Thus, in Massachusetts, if the action is trover, interest is recoverable as a matter of law; whereas, if the action is case for negligently destroying property, interest is discretionary with the jury.[45] The above principles, it is believed, ought to govern allowance of interest as damages in all cases; but it is impossible to say that they are yet the law. Perhaps the majority of cases proceed upon the principle, already mentioned, that defendant must be in default for not making payment, or interest cannot be recovered. The argu-

[44] Dana v. Fiedler, 12 N. Y. 40. The court said further: "If the giving or refusing interest rests in discretion, the law, to be consistent, should furnish some legitimate means of influencing its exercise by evidence, as by showing that the party in fault has failed to perform, either willfully or by mere accident and without any moral misconduct. All such considerations are constantly excluded from a jury, and they are properly told that, in such an action, their duty is to inquire whether a breach of the contract has happened, not what motives induced the breach. That by law a party is to have the difference between the contract price and the market price, in order that he may be indemnified, and because that rule affords the measure of his injury when it occurred; that he may not, as matter of law, recover interest, which is necessary to a complete indemnity; that, nevertheless, the jury may, in their discretion, give him a complete indemnity, by including the amount of interest in their estimate of his damages, but that he may not give any evidence to influence their discretion,—presents a series of propositions some of which cannot be law." Dana v. Fiedler, 12 N. Y. 40.

[45] Frazer v. Carpet Co., 141 Mass. 126, 4 N. E. 620.

ment seems to be that, as one cannot pay or make tender until both the time and the amount have been ascertained, one cannot be in default for not paying until the verdict. The fallacy of this theory has been already pointed out; but, as many cases are decided upon it, it must be constantly borne in mind in considering the actual state of the law. The following is the result of the decisions upon this theory:

65. CONTRACTS—In actions ex contractu, where the damages are unliquidated, interest is usually recoverable, as a matter of law:

(a) From the time of the breach, where the damages can be made certain by simple computation, or by reference to recognized standards such as market value (p. 160).

(b) From the time of demanding an accounting, where the demand is reasonable, and therefore puts defendant in default for not paying the amount which would have been found due (p. 161).

(c) From the date of the writ (p. 161).

One cannot pay or make tender until both the time and the amount due have been ascertained. As to time, in actions either for breach of contract or tort, compensation is due as soon as the amount is or should be ascertained, and therefore defendant cannot be charged with interest before that time. In actions for breach of contract, the allowance of interest is a question of law for the court.[46]

Damages Made Certain by Computation or Reference to Recognized Standards.

The old common-law rule, which required that a demand should be liquidated, or its amount in some way ascertained, before interest could be allowed, has been generally modified so far as to hold that, if the amount is capable of being ascertained by mere computation, then it shall carry interest.[47] "Id certum est, quod reddere certum potest." So, also, where the amount can be as-

[46] Mansfield v. New York Cent. & H. R. R. Co., 114 N. Y. 331, 21 N. E. 735, 1037.

[47] McMahon v. Railroad Co., 20 N. Y. 463.

certained by computation, together with a reference to well-established market values, interest is recoverable; for such values are so nearly certain that the debtor can obtain some proximate knowledge of how much he has to pay.[48]

Demand for Accounting—Commencement of Suit.

Where the plaintiff has made a reasonable demand for an accounting, and defendant fails to accede to it, or to pay the amount which would have been found due, he is in default from the date of demand, and chargeable with interest.[49] A demand for a sum assumed to be due may be considered a sufficient demand for a settlement, if the sum is a reasonable one.[50] The cases are not harmonious. Some hold that interest is recoverable from the beginning of the suit.[51] This may be sustained on principle, if the bring-

[48] Van Rensselaer v. Jewett, 2 N. Y. 135; McMahon v. New York & E. R. Co., 20 N. Y. 463; Mansfield v. New York Cent. & H. R. R. Co., 114 N. Y. 331, 21 N. E. 735, 1037; Sipperly v. Stewart, 50 Barb. 62; Smith v. Velie, 60 N. Y. 106. In an action for breach of a contract to deliver property at a certain time, interest is recoverable on the value of the property from that time. Pujol v. McKinlay, 42 Cal. 559; Bickell v. Colton, 41 Miss. 368; Bicknall v. Waterman, 5 R. I. 43; Merryman v. Criddle, 4 Munf. (Va.) 542; Enders v. Board of Public Works, 1 Grat. (Va.) 364, 390; Van Rensselaer's Ex'rs v. Jewett, 5 Denio, 135, 2 N. Y. 135; Van Rensselaer v. Jones, 2 Barb. 643; Livingston v. Miller, 11 N. Y. 80; McKenney v. Haines, 63 Me. 74; Savannah & C. R. Co. v. Callahan, 56 Ga. 331; Inhabitants of Canton v. Smith, 65 Me. 203–209. Contra, Dobenspeck v. Ormel, 11 Ind. 31. In Stark's Adm'r v. Price, 5 Dana, 140, it was held to be discretionary with the jury. Where the goods have not been paid for, interest is recoverable on the difference between the contract and the market price. Dana v. Fiedler, 12 N. Y. 40; Cease v. Cockle, 76 Ill. 484; Driggers v. Bell, 94 Ill. 223; Thomas v. Wells, 140 Mass. 517, 5 N. E. 485; Clark v. Dales, 20 Barb. 42; Hamilton v. Ganyard, 34 Barb. 204; Fishell v. Winans, 38 Barb. 228; Currie v. White, 6 Abb. Prac. (N. S.) 352, 385.

[49] Gray v. Van Amringe, 2 Watts & S. 128.

[50] Adams v. Fort Plain Bank, 36 N. Y. 255; Mygatt v. Wilcox, 45 N. Y. 306; Hand v. Church, 39 Hun, 303. Contra, People v. Supervisors of Delaware, 9 Abb. Prac. (N. S.) 408. A demand for an unreasonably large sum will not put defendant in default. Goff v. Inhabitants of Rehoboth, 2 Cush. 475; Shipman v. State, 44 Wis. 458.

[51] Goddard v. Foster, 17 Wall. 123; Mercer v. Vose, 67 N. Y. 56; Hand v. Church, 39 Hun, 303; Gammon v. Abrams, 53 Wis. 323, 10 N. W. 479; Tucker v. Grover, 60 Wis. 240, 19 N. W. 62; McCollum v. Seward, 62 N. Y. 316,

ing of suit is considered a demand; but it is hard to see why the bringing of a suit should set interest running, if a demand will not.[52] Other cases hold that interest is recoverable only after verdict, for the amount is not liquidated until then.[53] Where defendant reduces plaintiff's recovery by a recoupment, the demands on both sides are unliquidated, and interest on the balance is usually allowed only from verdict.[54] If it was defendant's duty to liquidate the debt, and he fails to do so, he is clearly in default, and chargeable with interest.[55] But, ordinarily, when plaintiff makes no demand for payment or accounting, interest is not recoverable, for defendant is not in default.[56]

66. TORTS—In actions ex delicto, interest is recoverable in proper cases, sometimes as a matter of legal right, and sometimes in the discretion of the jury.

67. In determining when interest is recoverable, the following rules may be stated:

(a) Interest is never recoverable on discretionary damages (p. 163).

(b) Where there is a pecuniary loss, of such a nature as to deprive one of title to a specific thing, or which

Feeter v. Heath, 11 Wend. 478; McCormick v. Railroad Co., 49 N. Y. 303; Hewitt v. Lumber Co., 77 Wis. 548, 46 N. W. 822. "Where interest is refused in actions of contract, on the ground that the claim is unliquidated, it is in fact usually allowed from the date of the writ." Sedg. Dam. § 315.

[52] White v. Miller, 78 N. Y. 393; McMaster v. State, 108 N. Y. 542, 15 N. E. 417.

[53] Cox v. McLoughlin, 76 Cal. 60, 18 Pac. 100; Murray v. Ware's Adm'r, 1 Bibb, 325; McKnight v. Dunlop, 4 Barb. 36; Pursell v. Fry, 19 Hun, 595; Day v. Railroad Co., 22 Hun, 412; Martin v. State, 51 Wis. 407, 8 N. W. 248.

[54] The Isaac Newton, 1 Abb. Adm. 588, Fed. Cas. No. 7,090; Brady v. Wilcoxson, 44 Cal. 239; Still v. Hall, 20 Wend. 51; McMaster v. State, 108 N. Y. 542, 15 N. E. 417. In Palmer v. Stockwell, 9 Gray, 237, interest was allowed on the balance recovered from the date of the writ.

[55] Moore v. Patton, 2 Port (Ala.) 451; McMahon v. Railroad Co., 20 N. Y. 463; Ansley v. Peters, 1 Allen (N. B.) 339; Robinson v. Stewart, 10 N. Y. 189, 197.

[56] Adams Exp. Co. v. Milton, 11 Bush, 49; Gallup v. Perue, 10 Hun, 525; People v. Supervisors, 9 Abb. Prac. (N. S.) 408; Marsh v. Fraser, 37 Wis. 149; Newell v. Keith, 11 Vt. 214.

is so regarded, interest is recoverable on the value of the property, as a matter of legal right (p. 163).

(c) Where there is a pecuniary loss, but not such as to deprive one of title to any specific thing, the jury may usually add interest, in their discretion, to make the compensation adequate (p. 165).

Interest on Discretionary Damages.

Where the damages caused by a tort are not only unascertained, but unascertainable, save by the enlightened conscience of a jury, interest cannot be recovered.[57] Nor can interest be allowed in cases where exemplary damages may be recovered.[58] Sums ascertainable only by the enlightened conscience of a jury do not bear interest before verdict, either as interest or as damages, within the discretion of the jury or without. Cases of this nature always involve nonpecuniary elements of injury, and have already been sufficiently explained. The jury have no such discretion when only actual pecuniary damage is involved.

Property Destroyed, Taken, Converted, and the Like.

Where property is destroyed or converted, the title is, or may be regarded as, out of the original owner. The right to recover a pecuniary equivalent vests absolutely, at once; and, as we have seen,[59] compensation for the loss of future use of the property cannot be recovered, but only compensation for the detention of money, i. e. interest. Therefore, in actions of trover, trespass, replevin, and the like, interest is recoverable on the value of the property from the time of the taking.[60] The right to interest as a part of the damages,

[57] Western & A. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912; Pittsburgh, S. Ry. Co. v. Taylor, 104 Pa. St. 306.

[58] Ratteree v. Chapman, 4 S. E. 684, 79 Ga. 574.

[59] Ante, p. 2.

[60] Ekins v. East India Co., 1 P. Wms. 395; Hamer v. Hathaway, 33 Cal. 117; Clark v. Whitaker, 19 Conn. 320; Tuller v. Carter, 59 Ga. 395; Sanders v. Vance, 7 T. B. Mon. 209; New Orleans Draining Co. v. De Lizardi, 2 La. Ann. 281; Hayden v. Bartlett, 35 Me. 203; Moody v. Whitney, 38 Me. 174; Robinson v. Barrows, 48 Me. 186; Hepburn v. Sewell, 5 Har. & J. 211; Thomas v. Sternheimer, 29 Md. 268; Maury v. Coyle, 34 Md. 235; Kennedy v. Whitwell, 4 Pick. 466; Negus v. Simpson, 99 Mass. 388; Winchester v. Craig, 33 Mich. 205; Chauncy v. Yeaton, 1 N. H. 151; Hyde v. Stone, 7 Wend. 354;

in actions of trover and trespass de bonis asportatis, was given, first, in England, by the statute of 3 & 4 Wm. IV. By that statute, the allowance was discretionary with the jury. Early cases in this country followed the English rule,[61] but gradually the principle that

Baker v. Wheeler, 8 Wend. 505; Stevens v. Low, 2 Hill, 132; Andrews v. Durant, 18 N. Y. 496; McDonald v. North, 47 Barb. 530; Pease v. Smith, 5 Lans. 519; Wehle v. Butler, 43 How. Prac. 5; Commercial Bank v. Jones, 18 Tex. 811; Gillies v. Wofford, 26 Tex. 76; Willis v. McNott, 75 Tex. 69, 12 S. W. 478; Rhemke v. Clinton, 2 Utah, 230; Grant v. King, 14 Vt. 367; Thrall v. Lathrop, 30 Vt. 307; Shepherd v. McQuilkin, 2 W. Va. 90; Bigelow v. Doolittle, 36 Wis. 115. Contra, Palmer v. Murray, 8 Mont. 312, 21 Pac. 126. In Stephens v. Koonce, 103 N. C. 266, 9 S. E. 315, the allowance was held discretionary with the jury. Where demand is necessary to establish the conversion, interest is recoverable only from demand. Garrard v. Dawson, 49 Ga. 434; Northern Transp. Co. v. Sellick, 52 Ill. 249; Johnson v. Sumner, 1 Metc. (Mass.) 172; Schwerin v. McKie, 51 N. Y. 180. In an action against a common carrier for the loss of goods, interest is allowed on their value. Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566; Woodward v. Railroad Co., 1 Biss. 403, Fed. Cas. No. 18,006; Fraloff v. Railroad Co., 10 Blatchf. 16, Fed. Cas. No. 5,025; The Gold Hunter, 1 Blatchf. & H. 300, Fed. Cas. No. 5,513; Parrott v. Railroad Co., 47 Conn. 575; Mote v. Railroad Co., 27 Iowa, 22; Robinson v. Transportation Co., 45 Iowa, 470; Cowley v. Davidson, 13 Minn. 92 (Gil. 86); McCormick v. Railroad Co., 49 N. Y. 303; Duryea v. Mayor, etc., of New York, 26 Hun, 120; Erie Ry. Co. v. Lockwood, 28 Ohio St. 358; Newell v. Smith, 49 Vt. 255; Whitney v. Railway Co., 27 Wis. 327. Contra, De Steiger v. Railroad Co., 73 Mo. 33; Fowler v. Davenport, 21 Tex. 626. "In an action for destroying or carrying off property, the plaintiff recovers interest from the time of the wrongful act." Sedg. Dam. § 316; Fail's Adm'r v. Presley's Adm'r, 50 Ala. 342; Oviatt v. Pond, 29 Conn. 479; Brown v. Railroad Co., 36 Ga. 377; Bradley v. Geiselman, 22 Ill. 494; Johnson v. Railway Co., 77 Iowa, 666, 42 N. W. 512; Buffalo & H. Turnpike Co. v. City of Buffalo, 58 N. Y. 639; Mairs v. Association, 89 N. Y. 498; City of Allegheny v. Campbell, 107 Pa. St. 530; Texas & P. R. Co. v. Tankersley, 63 Tex. 57. Contra, Green v. Garcia, 3 La. Ann. 702, where interest was refused because the demand was unliquidated.

In actions of replevin, where the prevailing party recovers, not the property itself, but its value, interest is allowed from the time the property was taken. Yelton v. Slinkard, 85 Ind. 190; Blackie v. Cooney, 8 Nev. 41; Brizee v. Maybee, 21 Wend. 144; McDonald v. Scaife, 11 Pa. St. 381; Bigelow v. Doolittle, 36 Wis. 115. Damages for detention and interest cannot both be recovered. McCarty v. Quimby, 12 Kan. 494.

[61] Beals v. Guernsey, 8 Johns. 446; Hyde v. Stone, 7 Wend. 354; Bissell v. Hopkins, 4 Cow. 53; Rawley v. Gibbs, 14 Johns. 385.

the right to interest was discretionary with the jury was abandoned, and it is now generally held that the plaintiff is entitled to interest on the value of property converted or lost to the owner by a trespass as a matter of law.[62] The interest is as necessary a part of a complete indemnity in such cases as the value itself, and is no more in the discretion of the jury than the value.[63]

Same—Destruction by Negligence.

It is difficult to perceive any sound distinction, in this regard, between cases where property is destroyed by a misfeasance, and where it is destroyed by negligence.[64] Some courts, in fact, allow interest in cases of negligence as a matter of law,[65] while others leave it to the discretion of the jury.[66]

Property Losses in General.

Where a tort causes a property loss, but is not such as to deprive the owner of title to any specific thing, as where the value of property is diminished by an injury wrongfully inflicted, the jury may, in their discretion, give interest on the amount by which the value is diminished from the time of the injury.[67] Only specific damages,

[62] Wilson v. City of Troy, 135 N. Y. 96, 32 N. E. 44.

[63] Andrews v. Durant, 18 N. Y. 496; McCormick v. Railroad Co., 49 N. Y. 303–315; Buffalo & H. Turnpike Co. v. City of Buffalo, 58 N. Y. 639; Parrott v. Ice Co., 46 N. Y. 361, 369.

[64] In Parrott v. Ice Co., 46 N. Y. 361, 369, it was said: "In cases of trover, replevin, and trespass, interest on the value of property unlawfully taken or converted is allowed by way of damages, for the purpose of complete indemnity of the party injured; and it is difficult to see why, on the same principle, interest on the value of property lost or destroyed by the wrongful or negligent act of another may not be included in the damages."

[65] Alabama G. S. R. Co. v. McAlpine, 75 Ala. 113; Arthur v. Railway Co., 61 Iowa, 648, 17 N. W. 24; Varco v. Railway Co., 30 Minn. 18, 13 N. W. 921; Chapman v. Railway Co., 26 Wis. 295; Dean v. Railway Co., 43 Wis. 305.

[66] Western & A. R. Co. v. McCauley, 68 Ga. 818; Chicago & N. W. Ry. Co. v. Shultz, 55 Ill. 421; Frazer v. Carpet Co., 141 Mass. 126, 4 N. E. 620; Home Ins. Co. v. Pennsylvania R. Co., 11 Hun, 182. In Lucas v. Wattles, 49 Mich. 380, 13 N. W. 782, it was said to be discretionary with the jury to allow interest from the date of the writ. In Houston & T. C. R. Co. v. Muldrow, 54 Tex. 233, the right to interest was denied absolutely; and in Toledo, P. & W. Ry. Co. v. Johnston, 74 Ill. 83, it was denied in the absence of aggravating circumstances.

[67] Thomas v. Weed, 14 Johns. 255; Walrath v. Redfield, 18 N. Y. 457, 462;

computable on direct or indirect evidence of actual value, can be thus increased.[68] It is sometimes said that the jury cannot award interest eo nomine in ordinary cases of torts, but that they may consider the lapse of time since the injury in estimating the damages.[69] Thus, in a Pennsylvania case,[70] where interest was claimed on the value of property negligently destroyed, it was said that interest, as such, could not be recovered in actions of tort, or in actions of any kind where the damages were not, in their nature, capable of exact computation, both as to time and amount, but that the jury might allow additional damages, in the nature of interest, for lapse of time. "It is never interest as such, nor as a matter of right, but as compensation for the delay, of which the rate of interest affords fair legal measure." So, in a Massachusetts case,[71] where the action was also for the negligent destruction of property, the court, after noting the fact that interest is allowed as of right in trover and other like actions, held that, in an action on the case for the negligent destruction of property, the jury, in their discretion, and as incident to determining the amount of the original loss, might consider the delay caused by the defendant, and that interest on the original damages was a fair measure of the damages caused by the delay. In

Mairs v. Association, 89 N. Y. 498; Duryee v. Mayor, etc., of New York, 96 N. Y. 477, 498; Home Ins. Co. v. Pennsylvania R. Co., 11 Hun, 182; Moore v. Railroad Co., 126 N. Y. 671, 27 N. E. 791; Pennsylvania S. V. R. Co. v. Ziemer, 124 Pa. St. 560, 17 Atl. 187; Black v. Railroad Co., 45 Barb. 40; Greenfield Sav. Bank v. Simons, 133 Mass. 415; Milbank v. Dennistown, 1 Bosw. 246. Interest may be recovered on money spent in repairing property injured (Whitehall Transp. Co. v. New Jersey Steam Boat Co., 51 N. Y. 369), or in repurchasing property wrongfully taken and sold (Dodson v. Cooper, 37 Kan. 346, 15 Pac. 200; McInroy v. Dyer, 47 Pa. St. 118). "We hold that, in this state, whenever one party has a legal right to recover of another a debt or damages as due at a particular time, he is also entitled to interest as an incident from the maturity of the demand until the trial." Stoudenmeier v. Williamson, 29 Ala. 558, 569. Interest has been allowed in an action for death of husband (Central R. Co. v. Sears, 66 Ga. 499); and for trespass on land (Duryee v. Mayor, etc., of New York, 96 N. Y. 477; Lawrence R. Co. v. Cobb, 35 Ohio St. 94); and for diverting water (Bare v. Hoffman, 79 Pa. St. 71).

[68] Western & A. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912.

[69] Clement v. Spear, 56 Vt. 401.

[70] Richards v. Gas Co., 130 Pa. St. 37–40, 18 Atl. 600.

[71] Frazer v. Carpet Co., 141 Mass. 126, 4 N. E. 620.

the supreme court of the United States it was said:[72] "Interest is not allowable as a matter of law, except in cases of contract or the unlawful detention of money. In cases of tort, its allowance as damages rests in the discretion of the jury."

68. CONDEMNATION PROCEEDINGS — Where property is taken under the right of eminent domain, interest is recoverable on the amount of the award from the time of the taking.

The taking of property under the right of eminent domain is analogous to a sale. If not agreed on, the damages are assessed as of the time of the taking, and interest on the amount ascertained is allowed as compensation for the detention of the money from that time.[73] The reason for the rule was well stated in a Pennsylvania case:[74] "If the plaintiff was entitled to compensation by reason of her property being taken at a particular time, she was certainly entitled to interest as compensation for its wrongful detention. The company, as well as the plaintiff, could have had the damages assessed as soon as they pleased after locating the road, and it was no reason for withholding compensation that its amount was unknown or unascertained. As the company was the party to pay, it ought to have had the amount ascertained, and paid it. Failing to do so, it has no right to complain at having to meet an incident of the delay in the shape of interest."

[72] Lincoln v. Claflin, 7 Wall. 132, 139.

[73] Hayes v. Railway Co., 64 Iowa, 753, 19 N. W. 245; Hartshorn v. Railroad Co., 52 Iowa, 613, 3 N. W. 648; Cohen v. Railroad Co., 34 Kan. 158, 8 Pac. 138; Bangor & P. R. Co. v. McComb, 60 Me. 290; Reed v. Railroad Co., 105 Mass. 303; Kidder v. Oxford, 116 Mass. 165; Chandler v. Aqueduct Corp., 125 Mass. 544; Sioux City, etc., R. Co. v. Brown, 13 Neb. 317, 14 N. W. 407; North Hudson County R. Co. v. Booraem, 28 N. J. Eq. 450; Atlantic & G. W. Ry. Co. v. Koblentz, 21 Ohio St. 334; Alloway v. City of Nashville, 88 Tenn. 510, 13 S. W. 123; Vette v. U. S., 76 Wis. 278, 45 N. W. 119; Old Colony R. Co. v. Miller, 125 Mass. 1; Parks v. City of Boston, 15 Pick. 198.

[74] Delaware, L. & W. R. Co. v. Burson, 61 Pa. St. 369, 380.

SAME—DEFENDANT NOT RESPONSIBLE FOR DELAY.

69. Where the defendant is not responsible for the delay in making compensation, he is not chargeable with interest.

Where defendant is in no way responsible for the delay, he is not liable for interest. He may be responsible for the delay, either because his original fault necessarily involves a delay, as where it causes an unliquidated loss which must be submitted to a jury, or because he simply refuses or fails to pay when it is his duty to pay. Where defendant is not responsible for the delay, the loss of interest is not a proximate consequence of his fault, and therefore cannot be recovered. For example, if defendant tenders the amount due, and it is refused, he is not liable for interest after the date of the tender. The loss of it is the debtor's own fault.* A debtor is not chargeable with interest on the debt by a delay in its payment, caused by his being summoned as trustee of the creditor in a trustee process.† Here the act of the law intervened and caused the loss.

INTEREST ON OVERDUE PAPER—CONTRACT AND STATUTE RATE.

70. Where a contract expressly provides for interest after maturity, it will be allowed at the stipulated rate, but where no express provision is made it is held:

(a) In some jurisdictions, that interest can be allowed only as damages, and at the statutory rate.

(b) In other jurisdictions, that interest accrues by the terms of the contract, and at the stipulated rate.

The rate at which interest shall be allowed, after maturity of a contract which expressly provides for interest, depends upon the construction of the contract, and raises a question upon which there is great conflict of authority. If the contract expressly provides for

* Thompson v. Railroad, 58 N. H. 524.

† Bickford v. Rich, 105 Mass. 340.

interest after maturity, if default is then made, it is recoverable, not as damages for the detention of the money, but under the contract, as part of the debt; and, of course, the stipulated rate governs. Upon this point the authorities are agreed. But where the contract merely provides for interest, and is silent as to interest after maturity, in many jurisdictions it is held that the contract is broken by nonpayment at maturity, and that only a claim for damages remains, and that, therefore, interest is allowed as damages, and at the statutory rate.[75] In other jurisdictions, however, it is held that there is an implied contract to pay the agreed rate after maturity, and that such interest is given under the contract, and not as damages.[76] The objection to the doctrine of an implied agreement to

[75] Cook v. Fowler, L. R. 7 H. L. 27; Goodchap v. Roberts, 14 Ch. Div. 49 (contra, Keene v. Keene, 3 C. B. [N. S.] 144); Gardner v. Barnett, 36 Ark. 476; Pettigrew v. Summers, 32 Ark. 571; Woodruff v. Webb, Id. 612; Newton v. Kennerly, 31 Ark. 626; Kohler v. Smith, 2 Cal. 597; Cummings v. Howard, 63 Cal. 503; First Ecclesiastical Soc. v. Loomis, 42 Conn. 570; Jefferson Co. v. Lewis, 20 Fla. 980; Robinson v. Kinney, 2 Kan. 178–184; Searle v. Adams, 3 Kan. 513–515; Rilling v. Thompson, 12 Bush (Ky.) 310; Duran v. Ayer, 67 Me. 145; Eaton v. Boissonnault, Id. 540; Brown v. Hardcastle, 63 Md. 484; Talcott v. Marston, 3 Minn. 339 (Gil. 238); Daniels v. Ward, 4 Minn. 168 (Gil. 113); Chapin v. Murphy, 5 Minn. 474 (Gil. 383); Moreland v. Lawrence, 23 Minn. 84; Ashuelot R. Co. v. Elliot, 57 N. H. 397; Macomber v. Dunham, 8 Wend. 550; U. S. Bank v. Chapin, 9 Wend 471; Hamilton v. Van Rensselaer, 43 N. Y. 244; Southern Cent. R. Co. v. Moravia, 61 Barb. 180 (contra, Miller v. Burroughs, 4 Johns. Ch. 436); Genet v. Kissam, 53 N. Y. Super. Ct. 43; Ludwick v. Huntzinger, 5 Watts & S. 51; Pearce v. Hennessy, 10 R. I. 223; Langston v. Railroad Co., 2 S. C. 248; Briggs v. Winsmith, 10 S. C. 133; Maner v. Wilson, 16 S. C. 469; Thatcher v. Massey, 20 S. C. 542; Perry v. Taylor, 1 Utah, 63. The supreme court of the United States has adopted the statutory rate as the true rule. Brewster v. Wakefield, 22 How. 108; Burnhisel v. Firman, 22 Wall. 170; Holden v. Trust Co., 100 U. S. 72. But it will consider itself bound by the decisions of the state courts, as on a question of local law. Cromwell v. County of Sac, 96 U. S. 51. In Indiana, the rule of the statutory rate was first established. Burns v. Anderson, 68 Ind. 202; Richards v. McPherson, 74 Ind. 158. These cases were overruled, and the rule of the contract rate established, by Shaw v. Rigby, 84 Ind. 375. This was an action on a note payable in one day, and clearly intended as a continuing security. It was unnecessary to overrule the prior cases to arrive at the result.

[76] Phinney v. Baldwin, 16 Ill. 108; Etnyre v. McDaniel, 28 Ill. 201; Shaw

pay the stipulated rate after maturity is that it introduces a provision into the contract which its terms do not cover, and thus makes for the parties a contract which they have not made for themselves.[77] Again, it might be reasonable, and under some circumstances the debtor might be very willing to pay the stipulated rate for a short time; but it does not follow that it would be reasonable or that the debtor would be willing to pay at the same rate, if, for some unforeseen cause, payment of the note should be delayed a considerable length of time.[78]

The clear intent of the parties always governs. The cases are unanimous upon this point. Thus, where a contract for the payment of money stipulates for interest "until paid," [79] "annually," [80] "annually upon the whole amount unpaid," [81] the intent is unmistakable, and interest is recovered, after maturity, under the contract, at the stipulated rate.[82] So, also, where a note is payable on de-

v. Rigby, 84 Ind. 375; Kimmel v. Burns, Id. 370; Kerr v. Haverstick, 94 Ind. 178; Hand v. Armstrong, 18 Iowa, 324; Thompson v. Pickel, 20 Iowa, 490; Brannon v. Hursell, 112 Mass. 63; Union Sav. Inst. v. Boston, 129 Mass. 82; Forster v. Forster, Id. 559; Downer v. Whittier, 144 Mass. 448, 11 N. E. 585; Warner v. Juif, 38 Mich. 662; Meaders v. Gray, 60 Miss. 400; Broadway Sav. Bank v. Forbes, 79 Mo. 226; Borders v. Barber, 81 Mo. 636; Macon Co. v. Rodgers, 84 Mo. 66; Kellogg v. Lavender, 15 Neb. 256, 18 N. W. 38; Monnett v. Sturges, 25 Ohio St. 384; Marietta Iron Works v. Lottimer, Id. 621; Hydraulic Co. v. Chatfield, 38 Ohio St. 575; Overton v. Bolton, 9 Heisk. 762; Pridgen v. Andrews, 7 Tex. 461; Hopkins v. Crittenden, 10 Tex. 189; Cecil v. Hicks, 29 Grat. (Va.) 1; Shipman v. Bailey, 20 W. Va. 140; Pickens v. McCoy, 24 W. Va. 344; Spencer v. Maxfield, 16 Wis. 178; Pruyn v. City of Milwaukee, 18 Wis. 367.

[77] Sedg. Dam. § 329.

[78] Cook v. Fowler, L. R. 7 H. L. 27.

[79] Latham v. Darling, 1 Scam. 203; Dudley v. Reynolds, 1 Kan. 285; Small v. Douthitt, Id. 335; Young v. Thompson, 2 Kan. 83; Broadway Sav. Bank v. Forbes, 79 Mo. 226; Hager v. Blake, 16 Neb. 12, 19 N. W. 780; Taylor v. Wing, 84 N. Y. 471; Lanahan v. Ward, 10 R. I. 299; Mobley v. Davega, 16 S. C. 73.

[80] Westfield v. Westfield, 19 S. C. 85.

[81] Miller v. Hall, 18 S. C. 141; Miller v. Edwards, Id. 600.

[82] Where the contract stipulates for interest "till the principal sum shall be payable," interest at the stipulated rate cannot be recovered after maturity. Spaulding v. Lord, 19 Wis. 533.

mand,[83] or one day after date,[84] the intent to make a continuing obligation is obvious, and therefore interest will be allowed at the stipulated rate.

A stipulation for interest after maturity is, in effect, an agreement for liquidated damages. Where the stipulated rate after maturity is higher than before, recovery has been denied, on the ground that it was a penalty.[85] So, also, it has been refused where the rate was grossly excessive.[86] But usually a higher rate may be recovered.[87]

COMPOUND INTEREST.

71. Compound interest, or interest upon interest, can be recovered only in the following cases:

(a) By special agreement, made after the original interest became due, interest thereon may be recovered.

(b) By custom, merchants may make yearly rests in their mutual accounts of principal and interest, and interest accrues on the balance due.

(c) Interest coupons, attached to bonds or other securities for the payment of money, bear interest.

(d) In cases of fraud or willful wrong, compound interest is sometimes allowed by way of punishment.

(e) Interest may be recovered as damages for nonpayment of interest due by contract as a debt, but not upon interest due as damages.

[83] Paine v. Caswell, 68 Me. 80.

[84] Casteel v. Walker, 40 Ark. 117; Gray v. Briscoe, 6 Bush, 687; Sharpe v. Lee, 14 S. C. 341; Piester v. Piester, 22 S. C. 139.

[85] Mason v. Callender, 2 Minn. 350 (Gil. 302); Talcott v. Marston, 3 Minn. 339 (Gil. 238); Kent v. Bown, 3 Minn. 347 (Gil. 246); Daniels v. Ward, 4 Minn. 168 (Gil. 113); Newell v. Houlton, 22 Minn. 19; White v. Iltis, 24 Minn. 43; Watts v. Watts, 11 Mo. 547.

[86] Henry v. Thompson, Minor (Ala.) 209.

[87] Herbert v. Railway Co., L. R. 2 Eq. 221; Miller v. Kempner, 32 Ark. 573; Portis v. Merrill, 33 Ark. 416; Browne v. Steck, 2 Colo. 70; Buckingham v. Orr, 6 Colo. 587; Lawrence v. Cowles, 13 Ill. 577; Smith v. Whitaker, 23 Ill. 367; Gould v. Bishop Hill Colony, 35 Ill. 321; Davis v. Rider, 53 Ill. 416; Witherow v. Briggs, 67 Ill. 96; Downey v. Beach, 78 Ill. 53; Funk v. Buck, 91 Ill. 575; Reeves v. Stipp, Id. 609; Wernwag v. Mothershead, 3 Blackf. 401;

Interest computed upon interest is called "compound interest." It is not favored in the law, and it is a general rule that compound interest cannot be recovered. Even an agreement made at the time of the original contract is of no avail.[88] The disallowance proceeds, not upon the ground of usury (for compound interest is not usury if no more than the lawful rate is charged), [89] but from motives of public policy, because of its harsh and oppressive character. "There is nothing unfair, or, perhaps, illegal, in taking a covenant, originally, that if interest is not paid at the end of the year, it shall be converted into principal. But this court will not permit that, as tending to usury, though it is not usury." [90] Chancellor Kent said:[91] "Compound interest cannot be demanded and taken, except upon a special agreement, made after the interest has become due." The general rule that compound interest cannot be recovered is well established,[92] but there are several equally well established exceptions.

After simple interest has accrued and remains unpaid, an agreement that it shall thereafter bear interest is valid.[93] There is nothing harsh or oppressive in such a contract.

Gower v. Carter, 3 Iowa, 244; Capen v. Crowell, 66 Me. 282; Davis v. Hendrie, 1 Mont. 499; Fisher v. Otis, 3 Pin. (Wis.) 83.

[88] State v. Jackson, 1 Johns. Ch. 13; Ossulston v. Yarmouth, 2 Salk. 449; Daniell v. Sinclair, L. R. 6 App. Cas. 181.

[89] Bowman v. Neely, 151 Ill. 37, 37 N. E. 840.

[90] Chambers v. Goldwin, 9 Ves. 254–271.

[91] Van Benschooten v. Lawson, 6 Johns. Ch. 313.

[92] Paulling v. Creagh's Adm'r, 54 Ala. 646; Mason v. Callender, 2 Minn. 350 (Gil. 302); Hager v. Blake, 16 Neb. 12, 19 N. W. 780; Mowry v. Bishop, 5 Paige, 98; Averill Coal & Oil Co. v. Verner, 22 Ohio St. 372; Genin v. Ingersoll, 11 W. Va. 549. Contracts in advance for compound interest have been sustained in Oregon (New England Mortg. Sec. Co. v. Vader, 28 Fed. 265); in Dakota (Hovey v. Edmison, 3 Dak. 449, 22 N. W. 594), and in South Carolina (Bowen v. Barksdale, 33 S. C. 142, 11 S. E. 640).

[93] Young v. Hill, 67 N. Y. 162; Fitzhugh v. McPherson, 3 Gill, 408; Gunn v. Head, 21 Mo. 432; Grimes v. Blake, 16 Ind. 160; Niles v. Board of Commissioners, 8 Blackf. 158; Forman v. Forman, 17 How. Prac. 255; Van Benschooten v. Lawson, 6 Johns. Ch. 313; Toll v. Hiller, 11 Paige, 228; Barrow v. Rhinelander, 1 Johns. Ch. 550; Doe v. Warren, 7 Me. 48; Thayer v. Wilmington Star Min. Co., 105 Ill. 540; Case v. Fish, 58 Wis. 56, 15 N. W. 808. A promise to pay interest on arrears of interest for the time already elapsed is binding. Rose v. City of Bridgeport, 17 Conn. 243–247; Camp v. Bates, 11 Conn. 497. Contra, Young v. Hill, 67 N. Y. 162.

It has long been the custom of merchants having mutual accounts to calculate interest on the various items, and to strike a balance of the principal and interest yearly; the sum found due being carried forward as the first item of the mutual account for the succeeding year. This custom constitutes a well-recognized exception to the rule against the allowance of compound interest.[94] The right to make rests grows out of the mutuality of dealings. When the mutual dealings cease, so, also, does the right to make rests.[95]

Interest coupons attached to bonds or other securities for the payment of money, when payable to bearer, have by commercial usage the legal effect of promissory notes, and possess the attributes of negotiable paper. They are contracts for the payment of a definite sum of money on a day named, and pass, by commercial usage, as negotiable paper. Interest is almost universally allowed on overdue coupons.[96] Interest on the bond is not compounded indefinitely,

[94] Sedg. Dam. § 344; Eaton v. Bell, 5 Barn. & Ald. 34; Barclay v. Kennedy, 3 Wash. C. C. 350, Fed. Cas. No. 976; Von Hemert v. Porter, 11 Metc. (Mass.) 210; Stoughton v. Lynch, 2 Johns. Ch. 209; Healy v. Gilman, 1 Bosw. 235; Langdon v. Town of Castleton, 30 Vt. 285; Davis v. Smith, 48 Vt. 52; Emerson v. Atwater, 12 Mich. 314; Carpenter v. Welch, 40 Vt. 251; Schieffelin v. Stewart, 1 Johns. Ch. 620; Backus v. Minor, 3 Cal. 231.

[95] Denniston v. Imbrie, 3 Wash. C. C. 396, Fed. Cas. No. 3,802; Von Hemert v. Porter, 11 Metc. (Mass.) 210.

[96] Gelpcke v. City of Dubuque, 1 Wall. 175; Aurora City v. West, 7 Wall. 82; Clark v. Iowa City, 20 Wall. 583; Town of Genoa v. Woodruff, 92 U. S. 502; Amy v. City of Dubuque, 98 U. S. 470; Koshkonong v. Burton, 104 U. S. 668; Pana v. Bowler, 107 U. S. 529, 2 Sup. Ct. 704; Rich v. Town of Seneca Falls, 19 Blatchf. 558, 8 Fed. 852; Fauntleroy v. Hannibal, 5 Dill. 219, Fed. Cas. No. 4,692; Hollingsworth v. City of Detroit, 3 McLean, 472, Fed. Cas. No. 6,613; Huey v. Macon Co., 35 Fed. 481; Harper v. Ely, 70 Ill. 581; Humphreys v. Morton, 100 Ill. 592; City of Jeffersonville v. Patterson, 26 Ind. 15; Forstall v. Association, 34 La. Ann. 770; Com. of Virginia v. State of Maryland, 32 Md. 501, Welsh v. Railroad Co., 25 Minn. 314; Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co., 41 Barb. 9; Burroughs v. Commissioners, 65 N. C. 234; McLendon v. Commissioners, 71 N. C. 38; Dunlap v. Wiseman, 2 Disn. 398; North Pennsylvania R. Co. v. Adams, 54 Pa. St. 94; Langston v. Railroad Co., 2 S. C. 248; Mayor, etc., of Nashville v. First Nat. Bank, 1 Baxt. 402; City of San Antonio v. Lane, 32 Tex. 405; Arents v. Com., 18 Grat. 750, 776; Gibert v. Railroad Co., 33 Grat. 586, 598; Mills v. Town of Jefferson, 20 Wis. 54. Contra, Rose v. City of Bridgeport, 17 Conn. 213; Force v. City of Elizabeth, 28 N. J. Eq. 403.

but once only. These are the reasons why they are excepted from the operation of the general rule.[97] The same reasons apply whenever separate interest notes are given. The allowance of interest in this class of cases may be sustained on another principle, which we are about to explain. Interest secured by coupons is a debt, on which interest may be given as damages.

As punishment for a fraudulent breach of trust, or other gross or willful wrong, the offender is often charged with compound interest.[98]

Compound interest is never allowed by way of damages.[99] But where, by the terms of a contract, interest is due at a fixed day, it is a debt; and, if not paid when due, interest thereon may be recovered as damages.[100] This secondary interest does not, in turn, bear in-

[97] Bowman v. Neely, 151 Ill. 37, 37 N. E. 840.

[98] Ackerman v. Emott, 4 Barb. 626. Where a trustee uses trust funds for his own benefit, he is liable for compound interest. Merrifield v. Longmire, 66 Cal. 180, 4 Pac. 1176; State v. Howorth, 48 Conn. 207; Jennison v. Hapgood, 10 Pick. 77; Schieffelin v. Stewart, 1 Johns. Ch. 620.

[99] Lewis v. Small, 75 Me. 323.

[100] Calhoun v. Marshall, 61 Ga. 275; Tillman v. Morton, 65 Ga. 386; Mann v. Cross, 9 Iowa, 327; Hershey v. Hershey, 18 Iowa, 24; Preston v. Walker, 26 Iowa, 205; Burrows v. Stryker, 47 Iowa, 477; Talliaferro's Ex'rs v. King's Adm'r, 9 Dana, 331; Peirce v. Rowe, 1 N. H. 179; Bledsoe v. Nixon, 69 N. C. 89; Anketel v. Converse, 17 Ohio St. 11; Cramer v. Lepper, 26 Ohio St. 59; Wheaton v. Pike, 9 R. I. 132; Lanahan v. Ward, 10 R. I. 299; Henderson v. Laurens, 2 Desaus. Eq. 170; Singleton v. Lewis, 2 Hill (S. C.) 408; Gibbs v. Chisolm, 2 Nott & McC. 38; Doig v. Barkley, 3 Rich. Law, 125; O'Neall v. Bookman, 9 Rich. Law, 80; House v. Female College, 7 Heisk. 128; Lewis v. Paschal's Adm'r, 37 Tex. 315; Catlin v. Lyman, 16 Vt. 44 (contra, Braughton v. Mitchell, 64 Ala. 210); Montgomery v. Tutt, 11 Cal. 307; Doe v. Vallejo, 29 Cal. 385; Denver Brick & Manuf'g Co. v. McAllister, 6 Colo. 261; Rose v. City of Bridgeport, 17 Conn. 243; Leonard v. Villars, 23 Ill. 377; Niles v. Board, 8 Blackf. 158; Doe v. Warren, 7 Me. 48; Banks v. McClellan, 24 Md. 62 (contra, Fitzhugh v. McPherson, 3 Gill, 408); Hastings v. Wiswall, 8 Mass. 455; Henry v. Flagg, 13 Metc. (Mass.) 64; Van Husan v. Kanouse, 13 Mich. 303; Dyar v. Slingerland, 24 Minn. 267; Corrigan v. Delaware Falls Co., 5 N. J. Eq. 232, 245; Mowry v. Bishop, 5 Paige, 98; Young v. Hill, 67 N. Y. 162 (contra, Howard v. Farley, 3 Rob. [N. Y.] 599); Sparks v. Garrigues, 1 Bin. (Pa.) 152; Stokely v. Thompson, 34 Pa. St. 210; Pindall v. Bank of Marietta, 10 Leigh, 481; Genin v. Ingersoll, 11 W. Va. 549. Interest may be recovered on the arrears of an

terest. For example, to ascertain the amount due on a matured obligation stipulating for the payment of interest at stated times, simple interest should be calculated from maturity on the principal sum plus the unpaid interest contracted for. Interest cannot be recovered on the amount due as damages for the nonpayment of the contractual interest.[101] So, in an action on a note stipulating for interest after maturity, and providing that, if the interest were not paid annually, it should become principal, and bear interest at the same rate, it was held[102] that the unpaid interest due at maturity of the note, and each successive annual installment of interest from that date, bore interest,—not, however, so as to compound the interest on the amounts in default. Simple interest only was allowed on the arrears of contractual interest, the court holding that only the interest on the principal became principal, and bore interest.

annuity. Elliott v. Beeson, 1 Har. (Del.) 106; Houston v. Jamison's Adm'r, 4 Har. (Del.) 330. Contra, Isenhart v. Brown, 2 Edw. 341; Adams v. Adams, 10 Leigh, 527. Even though it is in the form of interest on a fixed sum. Knettle v. Crouse, 6 Watts, 123; Addams v. Heffernan, 9 Watts, 529.

101 Wheaton v. Pike, 9 R. I. 132; Bledsoe v. Nixon, 69 N. C. 89.

102 Vaughan v. Kennan, 38 Ark. 114.

CHAPTER VI.

VALUE.

72. Definition.
73. How Estimated.
74–75. Market Value.
76. Value Peculiar to Owner.
77–78. Pretium Affectionis.
79. Time and Place of Assessment.
80. Highest Intermediate Value.
81–82. Medium of Payment—Legal Tenders.

DEFINITION.

72. Value is the estimated or appraised worth of a thing, calculated in money,—its pecuniary equivalent.

In speaking of the principles upon which compensation is awarded, we have had frequent occasion to refer to the "value" of the thing in question as furnishing the measure of recovery. In this chapter it is proposed to discuss the methods of ascertaining such value, and the elements that enter into the calculation.

The value of a thing is simply its pecuniary equivalent. Compensatory damages are intended as a pecuniary equivalent for the thing lost by defendant's wrong, and it follows that the assessment of compensatory damages, in almost every case, resolves itself primarily into an inquiry as to value. Where property is lost, converted, or destroyed, the owner is compensated when he receives its full value in money. Where a contract is broken, the value of the thing contracted for is the measure of compensation. Where a tort results in personal injury, the value of the time and labor lost, the medical attendance, etc., is an element, though not the only one, of compensation.

HOW ESTIMATED.

73. The value of property must be estimated with reference to the most valuable present or future use for which it is adapted.

It is obvious that the value of a thing does not depend upon the use to which it is put by the owner. Property may be stored in safe-deposit vaults and not used at all; but it is none the less valuable. It is the most advantageous possible use to which property may be put, and not the actual use to which it is put, that determines its value. Thus, it was held, in an action for use and occupation of a building adapted for use as a machine shop, that its rental value as a machine shop could be recovered, though defendant had used it only for storage.[1] And in estimating the value of a horse it was said: "Perhaps he would not have been worth anything as a fast trotter, or as a gentleman's carriage horse, because not adapted to the work; but that would not depreciate his value as a cart horse, for which purpose he was to be used."[2] So, also, in estimating the value of a cow, her exceptional value for breeding purposes, because of her thoroughbred blood, must be considered, and it would be error to limit the inquiry to her value for beef or milking purposes.[3]

Any possible future use must be considered in fixing the present value.[4] The possibility must not be merely speculative or conjectural, but must be reasonably certain, and such as to affect the selling price in the market.[5] "A man may have property well situated for a certain purpose,—such as a mill site, or as a farm, or as a residence or store, or as a mine,—and he may refuse to use it for any one of those purposes to which it is best suited. Still he may sell it in open market to a purchaser whose opinion of its present market value is based upon the future use to which it may be put. So he may claim, in any proceeding to condemn that land, the market value thereof, as that value is fixed by the public for those purposes. The difference between such a valuation and speculation seems clear. Land never used by its owner for any purpose is sought to be condemned. The fertility of the soil is one of the characteristics or properties of that land. It has never produced any

[1] Horton v. Cooley, 135 Mass. 589.

[2] Farrel v. Colwell, 30 N. J. Law, 123, 127.

[3] Central Branch U. P. R. Co. v. Nichols, 24 Kan. 242.

[4] Reed v. Ohio & M. Ry. Co., 126 Ill. 48, 17 N. E. 807; Ellington v. Bennett, 59 Ga. 286; Shenango & A. R. Co. v. Braham, 79 Pa. St. 447; Moore v. Hall, 3 Q. B. Div. 178; Holland v. Worley, 26 Ch. Div. 578.

[5] Sedg. Dam. § 253.

returns; but there is no attempt to prove future productions. They are speculative. The fertility of the soil is a fact,—a fact which in some cases may add great value to the property, and may be one of the constituents of the market price." [6] It was accordingly held [7] that, in proceedings for the condemnation of a mining claim for railroad purposes, the owner may prove the value of the land for town-lot purposes, whether built upon or not, in addition to proving its value as a prospect; but his recovery is confined to its value for one or the other purpose. Stated generally, the price to be paid for land taken in condemnation proceedings is its value for any purpose for which it is shown by the evidence to be available, and not simply its value as land as it is at the time.[8]

MARKET VALUE.

74. The market value is the price or rate at which a thing is sold.

75. The market value of an article is merely evidence of its real value, and is not conclusive.

The market value is the price or rate at which a thing is sold.[9] To make a market, there must be buying and selling. "If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that its value? Further, the holders of an article, as flour, for instance, under a false rumor, which, if true, would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market, or the actual circumstances which affect the market, but according to what, in their opinion, will be its market price or value provided the rumor shall prove to be true. In such case, it is clear that the asking price is not the worth of the

[6] Montana R. Co. v. Warren, 6 Mont. 275, 12 Pac. 641.

[7] Id.

[8] Reed v. Ohio & M. Ry. Co., 126 Ill. 48, 17 N. E. 807; Mississippi & R. R. Boom Co. v. Patterson, 98 U. S. 403, 407.

[9] Blydenburgh v. Welsh, Baldw. 331, 340, Fed. Cas. No. 1,583.

thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as a rule of damages is to make a defendant pay what never, in truth, was the value of the article, and to give the plaintiff a profit, by a breach of the contract, which he never could have made by its performance."[10] The market value is the fair cash value if sold in the market for cash, and not on time.[11] A single sale will not establish a market value.[12]

Value in Nearest Market.

Where there is no market for the article at the place where its value is to be estimated, the value at the nearest market is taken as a basis, and an allowance is made for the cost of transportation, the object being to ascertain the real value at the place of compensation.[13]

Value of Property in Course of Manufacture.

The value of articles partially manufactured is the value they would have when completed, less the cost of completing them.[14]

[10] Id.

[11] Brown v. Calumet R. Ry. Co., 125 Ill. 600, 18 N. E. 283.

[12] Graham v. Maitland, 1 Sweeny (N. Y.) 149.

[13] Bullard v. Stone, 67 Cal. 477, 8 Pac. 17; Sellar v. Clelland, 2 Colo. 532; Furlong v. Polleys, 30 Me. 491; Berry v. Dwinel, 44 Me. 255; Rice v. Manley, 66 N. Y. 82; Wemple v. Stewart, 22 Barb. 154; Grand Tower Min., Manuf'g & Transp. Co. v. Phillips, 23 Wall. 471; O'Hanlan v. Railway Co., 6 Best & S. 484, 34 Law J. (N. S.) Q. B. 154. If the nearest market is resorted to by persons from the place where the value is to be estimated as a place of purchase, the transportation charges must be added. See cases cited supra. If such market is a point of sale,—that is, if the goods are worth more there than at the place where their value is to be estimated,—the cost of transportation must be deducted. Harris v. Panama R. Co., 58 N. Y. 660; Cockburn v. Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49. See, also, Glaspy v. Cabot, 135 Mass. 435. Cf. Johnson v. Allen, 78 Ala. 387; McDonald v. Unaka Timber Co., 88 Tenn. 38, 12 S. W. 420; Hendrie v. Neelon, 12 Ont. App. 41; Saunders v. Clark, 106 Mass. 331. It is presumed, prima facie, that goods are worth as much at the point of destination as at the place of shipment. Rome R. Co. v. Sloan, 39 Ga. 636; South & N. A. R. Co. v. Wood, 72 Ala. 451; Echols v. Louisville & N. R. Co., 90 Ala. 366, 7 South. 655; Richmond v. Bronson, 5 Denio, 55.

[14] Emmons v. Westfield Bank, 97 Mass. 230.

Value of Property for Which There is No Market Value.

A market value, as signifying a price established by sales in the ordinary course of business, is not necessary to a judicial valuation. Property is often subject to such valuation for which no proof of value in the market could be given, because it is not bought and sold in the ordinary course of trade, and is not known in the market. In such cases the real value is to be ascertained from such elements of value as are attainable.[15] "The market price, in the ordinary sense, is generally, but not always, the test of value. For such a tort as a conversion of goods, a plaintiff may be entitled to large damages, though unable to sell the goods at any price. He may be greatly injured by the loss of goods which he cannot sell, but which would be productive of great benefit, and therefore would be of great value, without a sale."[16] The promissory note of an individual may have no market value. But proof of the solvency of the maker, or that the note is secured by collateral, in whole or in part, furnishes a basis for a fair valuation.

Market Price is Merely Evidence of Value.

The market price of an article is only a means of arriving at its real value.[17] It is not itself the value of the article, but it is evidence of the value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption.[18] Where an article is destroyed which can be readily replaced by purchase in the market, so as to put the owner in as good a position as he was before, the market price and real value will be the same. In such cases, the market value is said to be the measure of damages, but per-

[15] Murray v. Stanton, 99 Mass. 345. "If at any particular time there be no market demand for an article, it is not on that account of no value." Trout v. Kennedy, 47 Pa. St. 387, 393. In Erie & P. R. Co. v. Douthet, 88 Pa. St. 243, the value of a pass for life for an entire family over a railroad was estimated. But see Brown v. St. Paul, M. & M. R. Co., 36 Minn. 236, 31 N. W. 941.

[16] Hovey v. Grant, 52 N. H. 569, 581.

[17] Sedg. Dam. § 243. "What a thing will bring in the market at a given time is, perhaps, the measure of its value then, but not the only one." Trout v. Kennedy, 47 Pa. St. 387.

[18] Kountz v. Kirkpatrick, 72 Pa. St. 376. Defendant cannot show that the article was intrinsically of no value, and that the market value was due to a misapprehension on the part of the public. Smith v. Griffith, 3 Hill, 333.

haps it would be more accurate to say that the value of the article was the measure.

Stocks, Bonds, and Other Securities.

The value of securities for the payment of money is, prima facie, the amount secured.[19] Where the securities have a market value, as in the case of stocks and bonds, that value ordinarily controls.[20] Where there is no market value, the intrinsic value may be shown.[21] The prima facie value of bills and notes may be reduced by showing invalidity, payment, or insolvency of the maker;[22] but the maker cannot show his own insolvency.[23]

[19] BILLS AND NOTES. Evans v. Kymer, 1 Barn. & Adol. 528; St. John v. O'Connel, 7 Port. (Ala.) 466; Ray v. Light, 34 Ark. 421; American Exp. Co. v. Parsons, 44 Ill. 312; Hersey v. Walsh, 38 Minn. 521, 38 N. W. 613; Menkens v. Menkens, 23 Mo. 252; Bredow v. Mutual Sav. Inst., 28 Mo. 181; Decker v. Mathews, 12 N. Y. 313; Metropolitan El. R. Co. v. Kneeland, 120 N. Y. 134, 24 N. E. 381; Ramsey v. Hurley, 72 Tex. 194, 12 S. W. 56; Robbins v. Packard, 31 Vt. 570. See, also, Barron v. Mullin, 21 Minn. 374. The value of a savings bank book is, prima facie, the amount of deposits. Wegner v. Second Ward Sav. Bank, 76 Wis. 242, 44 N. W. 1096. Of an account, its face value. Sadler v. Bean, 37 Iowa, 439.

[20] BONDS. Hayes v. Massachusetts Mut. Life Ins. Co., 125 Ill. 626, 18 N. E. 322; First Nat. Bank of Monmouth v. Strang, 28 Ill. App. 325; Callanan v. Brown, 31 Iowa, 333; Griffith v. Burden, 35 Iowa, 138; Roberts v. Berdell, 61 Barb. 37; Wintermute v. Cooke, 73 N. Y. 107; Simpkins v. Low, 54 N. Y. 179.

STOCKS. Deck's Adm'r v. Feld, 38 Mo. App. 674; Ormsby v. Mining Co., 56 N. Y. 623; Connor v. Hillier 11 Rich. 193. And see Dekany's Adm'rs v. Hill, 1 Pittsb. R. 28.

[21] Redding v. Godwin, 44 Minn. 355, 46 N. W. 563; Deck's Adm'r v. Feld, 38 Mo. App. 674; Huse & Loomis Ice & Transp. Co. v. Heinze, 102 Mo. 245, 14 S. W. 756.

[22] Zeigler v. Wells, Fargo & Co., 23 Cal. 179; American Exp. Co. v. Parsons, 44 Ill. 312; Latham v. Brown, 16 Iowa, 118; O'Donoghue v. Carby, 22 Mo. 393; Potter v. Merchants' Bank, 28 N. Y. 641; Cothran v. Hanover Nat. Bank, 40 N. Y. Super. Ct. 401. An immaterial alteration will not reduce the damages. It must be such as will vitiate the instrument. Booth v. Powers, 56 N. Y. 22. See, also, Rose v. Lewis, 10 Mich. 483.

[23] Stephenson v. Thayer, 63 Me. 143; Outhouse v. Outhouse, 13 Hun. 130; Robbins v. Packard, 31 Vt. 570; Kalckhoff v. Zoehrlaut, 43 Wis. 373; Texas W. Ry. Co. v. Gentry, 69 Tex. 625, 8 S. W. 98; Memphis & L. R. R. Co. v. Walker, 2 Head, 467.

Good Will of Established Business.

The value of the good will of an established business may be estimated on a basis of past profits.[24] A depression may be shown to reduce the estimate.[25] In an English case,[26] it was said that the good will of premises should be valued at such a sum as persons who are in the habit of estimating such things would fix as the value of the good will of the premises under ordinary circumstances. The improved value of neighboring property may be considered.

VALUE PECULIAR TO OWNER.

76. Where property has a peculiar value to the owner, such as it has to no other person, or where it cannot be exactly replaced by other goods of like kind, the actual value to the owner, and not the market value, is the measure of compensation.

This rule has frequent application where compensation is claimed for the loss of household goods and furniture, wearing apparel, and the like. In such a case it was said: "He could hardly have supplied himself in the market with goods in the same condition and so exactly suited to his purposes as were those of which he had been deprived. As compensation for the actual loss is the fundamental principle upon which this measure of damages rests, it would seem that the value of such goods to their owner would form the proper rule on which he should recover; not any fanciful price that he might for special reasons place upon them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of articles so specially adapted to the use of himself and his family."[27] In a similar case it was said: "The clothing was made to fit plaintiff, and had been partly worn. It would sell for but little, if put into the market to be sold for secondhand clothing; and it would be a wholly inadequate and unjust rule of compensation to give plaintiff,

[24] Ante, 74.

[25] Chapman v. Kirby, 49 Ill. 211, 219.

[26] Llewellyn v. Rutherford, L. R. 10 C. P. 456.

[27] International & G. N. Ry. Co. v. Nicholson, 61 Tex. 550, 553.

in such a case, the value of the clothing thus ascertained. The rule must be the value of the clothing for use by the plaintiff. No other rule would give him a compensation for his damages. This rule must be adopted because such clothing cannot be said to have a market price, and it would not sell for what it was really worth." [28] In such cases, the value is to be properly fixed by considerations of cost and actual worth at the time of the loss, without reference to what they could be sold for in any particular market.[29] The rule applies where the property destroyed cannot be replaced. Thus the measure of damages for the destruction of a family portrait is "the actual value to him who owns it, taking into account its cost, and the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner." [30] Family portraits or heirlooms have a peculiar value to the owner, and may also be difficult or impossible to replace. The recovery of their real value to the owner may be sustained under either branch of the rule. Such articles have no market price, and their value must be determined on other considerations.[31]

PRETIUM AFFECTIONIS.

77. A pretium affectionis is an imaginary value placed upon a thing by the fancy of its owner, growing out of his attachment for the specific article and its associations.

78. A pretium affectionis is never taken as a basis of compensation, for it is not the real value.

The imaginary or sentimental value sometimes placed upon property by its owner, growing out of his attachment for that specific

[28] Fairfax v. New York Cent. & H. R. R. Co., 73 N. Y. 167. On loss of baggage, plaintiff is entitled to recover its value for use to him, and not market value. Simpson v. New York, N. H. & H. R. Co. (Sup.) 38 N. Y. Supp. 341.

[29] Denver, S. P. & P. R. Co. v. Frame, 6 Colo. 382, 385.

[30] Green v. Boston & L. R. Co., 128 Mass. 221, 226. See Houston & T. C. R. Co. v. Burke, 55 Tex. 323.

[31] The actual value to the owner does not mean the pretium affectionis. Sedg. Dam. § 251.

property, the "pretium affectionis," as it is called, cannot be recovered as compensation for the destruction or conversion of such property.[32] In speaking of the action of trover, Prof. Parsons said:[33] "Whether in this or any action, instead of the actual value, that which the plaintiff puts upon the property, as a gift, perhaps of a dear friend, or for other purely personal reasons, can be recovered, is not, perhaps, certain. We think it quite clear, however, that this pretium affectionis cannot be recovered, unless in cases where the conversion or appropriation by the defendant was actually tortious; and in that case we should be disposed to hold that the defendant should be made to pay what he would have been obliged to give if he had bought the article, or, at least, that the damages might be considerably enlarged in such a case, on the principle of exemplary damages." Mr. Field thinks that the jury should determine, under all the circumstances of the case, the amount of damages.[34] In Suydam v. Jenkins[35] it was said, obiter: "In most cases the market value of the property is the best criterion of its value to the owner, but in some its value to the owner may greatly exceed the sum that any purchaser would be willing to pay. The value to the owner may be enhanced by personal or family considerations, as in the case of family pictures, plate, etc.; and we do not doubt that the 'pretium affectionis,' instead of the market price, ought then to be considered by the jury or court in estimating the value." When analyzed, the damage caused by the loss or destruction of property of this nature, consists of two elements: First, the loss of the real property value; second, the grief or mental suffering at the loss of the cherished article. From this we gather what we apprehend to be the true rule, which is that, where property is of such a nature that its loss or destruction, under the circumstances, naturally and proximately causes mental suffering, compensation for such mental

[32] Moseley v. Anderson, 40 Miss. 49. The satisfaction and pleasure which the possession of an article gives, like the satisfaction which comes from having a contract respected and performed, is of a nature that the law does not recognize as a subject for compensation. Sedg. Dam. § 251.

[33] 3 Pars. Cont. (8th Ed.) 209

[34] Field, Dam. § 817. See, also, Whitfield v. Whitfield, 40 Miss. 352; Id., 44 Miss. 254; Bickell v. Colton, 41 Miss. 368.

[35] 3 Sandf. 614, 621.

suffering may be recovered, in a proper action, in addition to the actual value of the property.

TIME AND PLACE OF ASSESSMENT.

79. As a general rule, value should be estimated as of the time and at the place where the owner was deprived of the thing valued.

As a general rule, value is assessed as of the time and at the place where the owner is deprived of it. This is on the theory that such value is beneficially equal to the property itself.[36] Interest is usually added as compensation for delay in payment. The rule is of general application, wherever the question of value is involved. Thus, the measure of damages, in actions for conversion, is ordinarily the value of the property converted at the time and place of conversion.[37] In condemnation proceedings, it is the value at the time

[36] Ewing v. Blount, 20 Ala. 694; Simpson v. Alexander, 35 Kan. 225, 11 Pac. 171; Cutler v. James Goold Co., 43 Hun, 516.

[37] Robinson v. Hartridge, 13 Fla. 501; Spencer v. Vance, 57 Mo. 427; Cole v. Ross, 9 B. Mon. 393; Spicer v. Waters, 65 Barb. 227; Briscoe v. McElween, 43 Miss. 556; Dixon v. Caldwell, 15 Ohio St. 412; New York Guaranty & Indemnity Co. v. Flynn, 65 Barb. 365; Fowler v. Merrill, 11 How. 375; Watt v. Potter, 2 Mason, 77, Fed. Cas. No. 17,291; Bourne v. Ashley, 1 Low. 27, Fed. Cas. No. 1,699; Allen v. Dykers, 3 Hill, 593; Lee v. Mathews, 10 Ala. 682; Moore v. Aldrich, 25 Tex. Supp. 276; Ripley v. Davis, 15 Mich. 75; Final v. Backus, 18 Mich. 218; Barry v. Bennett, 7 Metc. (Mass.) 354; Falk v. Fletcher, 18 C. B. (N. S.) 403; Taylor v. Ketchum, 5 Rob. (N. Y.) 507; Selkirk v. Cobb, 13 Gray, 313; Agnew v. Johnson, 22 Pa. St. 471; Phillips v. Speyers, 49 N. Y. 653; Tyng v. Commercial Warehouse Co., 58 N. Y. 308; Andrews v. Durant, 18 N. Y. 496; Ormsby v. Vermont Copper Min. Co., 56 N. Y. 623; Douglass v. Kraft, 9 Cal. 562; Yater v. Mullen, 24 Ind. 277; Dillenback v. Jerome, 7 Cow. 298; Dennis v. Barber, 6 Serg. & R. 420; Hurd v. Hubbell, 26 Conn. 389; Cook v. Loomis, Id. 483; Lyon v. Gormley, 53 Pa. St. 261; Stirling v. Garritee, 18 Md. 468; Carlyon v. Lannan, 4 Nev. 156; Boylan v. Huguet, 8 Nev. 345; Hamer v. Hathaway, 33 Cal. 117; Page v. Fowler, 39 Cal. 412; Riley v. Martin, 35 Ga. 136; Grant v. King, 14 Vt. 367; Crumb v. Oaks, 38 Vt. 566; Kennedy v. Strong, 14 Johns. 128; Ryburn v. Pryor, 14 Ark. 505; Hatcher v. Pelham, 31 Tex. 201; Jenkins v. McConico, 26 Ala. 213; Robinson v. Barrows, 48 Me. 186; Sanders v. Vance, 7 T. B. Mon. 209; Clark v. Whit-

and place of taking.[38] In actions for breach of a contract of sale, it is the value at the time and place the goods should have been delivered.[39] An important exception to the rule is sometimes recognized in the case of property of a fluctuating value, and especially in the case of corporate stocks.

SAME—HIGHEST INTERMEDIATE VALUE.

80. In many, but not all, jurisdictions, where one has been wrongfully deprived of property of a fluctuating value, the highest value intermediate the wrong and the end of the trial, is the measure of damages, provided the action is brought within a reasonable time.

EXCEPTION—The rule is sometimes confined to transactions in stocks.

aker, 19 Conn. 319; Linville v. Black, 5 Dana, 177; Commercial & Agricultural Bank v. Jones, 18 Tex. 811; Davis v. Fairclough, 63 Mo. 61; Daniel v. Holland, 4 J. J. Marsh, 26; King v. Ham, 6 Allen, 298; Lillard v. Whitaker, 3 Bibb, 92; Scull v. Briddle, 2 Wash. C. C. 150, Fed. Cas. No. 12,569; Williams v. Crum, 27 Ala. 468; Kennedy v. Whitwell, 4 Pick. 466; Linam v. Reeves, 68 Ala. 89; Jones v. Horn, 51 Ark. 19, 9 S. W. 309; Brasher v. Holtz, 12 Colo. 201, 20 Pac. 616; Ford v. Roberts, 14 Colo. 291, 23 Pac. 322; Skinner v. Pinney, 19 Fla. 42; Brewster v. Van Liew, 119 Ill. 554, 8 N. E. 842; First Nat. Bank v. Strang, 28 Ill. App. 325, 338; Thew v. Miller, 73 Iowa, 742, 36 N. W. 771; Simpson v. Alexander, 35 Kan. 225, 11 Pac. 171; Chamberlain v. Worrell, 38 La. Ann. 347; Hopper v. Haines, 71 Md. 64, 18 Atl. 29, and 20 Atl. 159; Forbes v. Boston & L. R. Co., 133 Mass. 154; Jellett v. St. Paul, M. & M. Ry. Co., 30 Minn. 265, 15 N. W. 237; Black v. Robinson, 62 Miss. 68; Nance v. Metcalf, 19 Mo. App. 183; Barlass v. Braash, 27 Neb. 212, 42 N. W. 1028; Beede v. Lamprey, 64 N. H. 510, 15 Atl. 133; Railroad Co. v. Hutchins, 37 Ohio St. 282; Blum v. Merchant, 58 Tex. 400; Miller v. Jannett, 63 Tex. 82; Crampton v. Valido Marble Co., 60 Vt. 291, 15 Atl. 153; Arkansas Val. Land & Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458; Ghen v. Rich, 8 Fed. 159; Neiswanger v. Squier, 73 Mo. 192; Ingram v. Rankin, 47 Wis. 406, 2 N. W. 755; Perkins v. Marrs, 15 Colo. 262, 25 Pac. 168.

[38] Indiana, B. & W. Ry. Co. v. Allen, 100 Ind. 409; Chaffee's Appeal, 56 Mich. 244, 22 N. W. 871; Alloway v. City of Nashville, 88 Tenn. 511, 13 S. W. 123.

[39] See post, p. 241.

In actions for conversion, an exception to the rule that the measure of damages is the value of the property, with interest from the time of conversion, has been recognized where the property is of a fluctuating value.[40] In such cases, in many jurisdictions, the plaintiff is entitled to recover the highest value the property has reached at any time intermediate the conversion and the end of the trial, provided the action be brought within a reasonable time. This exception has given rise to great conflict in the decisions. It proceeds upon the principle that, where an owner is wrongfully deprived of his property, he and not the wrongdoer should have the benefit of a subsequent increase in value, and that to hold otherwise would practically permit one to force a sale to himself, at his own price, by selecting a period of great depression to convert the property, and, by having the benefit of a subsequent increase in value, to receive large profits from his own wrong.[41] These reasons are equally applicable in all cases where one is wrongfully deprived of his property, and the rule has accordingly been applied in actions of detinue [42] and replevin, [43] in actions for refusal to transfer or deliver corporate stock, [44] and in actions for failure to deliver goods sold, the price of which had been paid in advance.[45] The rule of damage should not depend on the form of action; and, indeed, the Codes have very generally abolished all artificial distinctions.

Objections to the Doctrine.

A just indemnity for all losses which are the natural, proximate, and certain results of the wrong complained of, is the rule of com-

40 The qualification that the property be of a fluctuating value would seem to be unimportant, as it is doubtful if there is any property entirely stable in value; and, besides, if the property did not fluctuate, it would be immaterial at what time the value was taken. Field, Dam. § 799.

41 Suth. Dam. § 1119; Field, Dam. § 812.

42 Johnson v. Marshall, 34 Ala. 522.

43 In Suydam v. Jenkins, 3 Sandf. 614, it was held that the damages recoverable in replevin were the same as in trover, but that in neither case was the rule of highest intermediate value of invariable application.

44 Bank of Montgomery Co. v. Reese, 26 Pa. St. 143; Musgrave v. Beckendorff, 53 Pa. St. 310.

45 Gilman v. Andrews, 66 Iowa, 116, 23 N. W. 291; Harrison v. Charlton, 37 Iowa, 134; Myer v. Wheeler, 65 Iowa, 390, 21 N. W. 692; Gregg v. Fitzhugh, 36 Tex. 127; Kent v. Ginter, 23 Ind. 1.

pensation, whether the action be in contract or in tort. Testing the rule of highest intermediate value by this principle, several objections to its adoption as a uniform rule of damages become apparent. For instance, on what principle can the plaintiff be said to have lost the highest intermediate value, when the property was not intended for sale, but for use, or even, when the property was intended for sale, if it would have been sold in the course of business before the advance occurred?[46] It is true that in some cases the plaintiff may have been injured to the extent of the highest value of the property at any time before the trial; but, perhaps in the majority of cases, this would not be so. In the case of raw material, perishable property, or property intended for consumption, the probabilities are that it would have been disposed of within a short time, and no benefit would have been realized by the subsequent increase in value.[47] Again, the presumption that the owner would have disposed of his property when it reached the highest figure would not accord with fact once in a hundred times.[48]

The objections to the doctrine have been ably stated by Duer, J.:[49] "When the evidence justifies the conclusion that a higher price would have been obtained by the owner had he kept the possession, or has been obtained by the wrongdoer, we have admitted and shown that it ought to be included in the estimate of damages,—in the first case, as a portion of the indemnity to which the owner is entitled, and, in the second, as a profit which the wrongdoer cannot be permitted to retain; but we cannot admit that the same rule is to be followed where nothing more is shown than a bare possibility that the highest price would have been realized, and still less where it is proved that it would not have been obtained by the owner, and has not been obtained by the wrongdoer. * * * Our objections to considering an intermediate higher value as an invariable rule of damages have already been stated, and need not be repeated. It is perfectly just, when the enhanced price has been realized by the wrongdoer, or it is reasonable to believe would have been realized by the owner, had he retained the possession; but in all other

[46] Sedg. Dam. (8th Ed.) § 509, note, on page 110.

[47] Pinkerton v. Railroad, 42 N. H. 424, 462.

[48] Wright v. Bank, 110 N. Y. 237, 246, 18 N. E. 79.

[49] Suydam v. Jenkins, 3 Sandf. 614, 624, 629.

cases damages founded upon such an estimate are either purely speculative or plainly vindictive. They are conjectural and speculative when it is barely possible that the owner, had he retained the possession, would have derived a benefit from the higher value. They are vindictive when it is certain that no such benefit could have resulted to him."

If the rule limiting damages to the value of the property at the time of conversion, with interest thereon, is to be departed from in any case, and a higher value allowed, it would seem, on principle, that it should be done only when it is proved, and not merely presumed, that the higher value would actually have been realized.[50]

The rule of highest intermediate value has not met with universal favor. In many jurisdictions it is repudiated altogether, and in others its application is greatly limited. Sometimes it is applied only to stock transactions,[51] and sometimes it is applied to any

[50] Sedg. Dam. (8th Ed.) § 509, note; Meshke v. Van Doren, 16 Wis. 319; Suydam v. Jenkins, 3 Sandf. 614, 629; Symes v. Oliver, 13 Mich. 9; Ewart v. Kerr, 2 McMul. 141; De Clerq v. Mungin, 46 Ill. 112; Ingram v. Rankin, 47 Wis. 406, 420, 2 N. W. 755. Where defendant is in possession of the property at the time of trial, there is no injustice in compelling him to pay its value at that time. Suth. Dam. § 1125; Ingram v. Rankin, 47 Wis. 420, 2 N. W. 755.

[51] Field, Dam. §§ 808, 812. Bank of Montgomery Co. v. Reese, 26 Pa. St. 143. In Suydam v. Jenkins, 3 Sandf. 614, 633, the distinction between stocks and other personal property was justified on the ground—"First, that as chancery may decree a specific execution of a contract for replacing stock, and the defendant, when such a decree is made, to enable himself to perform it, must of necessity purchase the stock at its then market price, he can have no right to complain when he is compelled to pay the same sum as damages, by the judgment of a court of law; and, second, that as stock is usually held, not for sale, but as a permanent investment, it is a reasonable presumption that, had it not been replaced at the stipulated time, whatever it might be is no more than an indemnity." But, as Mr. Sedgwick has pointed out (2 Sedg. Dam. [8th Ed.] p. 110, note), though these are the reasons commonly assigned for the distinction, it is very doubtful whether a decree can be had for specific performance of such an agreement, damages being an adequate remedy for the breach. Story, Eq. Jur. §§ 717, 717a; Buxton v. Lister, 3 Atk. 383; Sullivan v. Tuck, 1 Md. Ch. 59. And as to stocks of a fluctuating value, it is quite as probable that they were bought for speculation as that they were bought for investment. Mr. Field also comes to the conclusion that there is no sound distinction in this regard between stocks and other personal property. Field, Dam. § 813.

transaction in merchandise of a fluctuating value. It would be an herculean task to review all the various and conflicting opinions that have been delivered on this subject, but we shall notice a few as illustrations of the different views taken.

Applications of the Rule.

In New York, in an early case,[52] the rule was adopted in its broadest terms, no distinction being made between stocks and other personal property. The action was for the conversion of stock. The trial was a protracted one, and during its continuance the value of the stock increased over $2,000, which the plaintiff was allowed to recover. The rule adopted was that, where there is any uncertainty or fluctuation attending the value, and the chattel afterwards rises in value, the plaintiff is entitled to recover the highest market value of the property, at any time intermediate the conversion and the end of the trial, provided the action is brought within a reasonable time. In a later case[53] a different rule was sanctioned. The action was for the conversion of wheat, and the measure of damages adopted was the highest value between the time of conversion and a reasonable time thereafter in which to commence the action. The court said:

"In the absence of any definite means for ascertaining the period when the owner of the property would have disposed of it, we are necessarily more or less in the dark as to the amount of injury which he has sustained by the illegal act of the defendants, and are driven to resort more or less to conjecture, or to fix upon some arbitrary period for determining the price of the property. It is obviously a rule of doubtful justice to give to the plaintiff the whole period until the statute of limitations would attach for the commencement of this action, and the whole period intervening between the conversion and the trial to select his standard of price, without ever having given notice of his intention to adopt the price of any particular period. A much more just and equitable rule, independent of adjudications upon this question, would seem to be to allow to the

[52] Romaine v. Van Allen, 26 N. Y. 309. See, also, Cortelyou v. Lansing, 2 Caines, Cas. 200; West v. Wentworth, 3 Cow. 82; Wilson v. Mathews, 24 Barb. 295. In Brass v. Worth, 40 Barb. 648, a rule was declared more nearly consistent with the later than the earlier authorities.

[53] Scott v. Rogers, 31 N. Y. 676, 682.

plaintiff some reasonable period, within the statute of limitations, for fixing the price of the property, provided he notifies the adverse party at the time of such act on his part, but never to allow him unlimited liberty of selection as to the price of which he will avail himself at the trial of the cause. If he does not make and notify his election of time, then to fix the time by the day of commencing the action, provided the action be commenced within a reasonable time after the conversion. This is an election to hold the defendant liable for the conversion, and, in effect, to treat the property as his. * * * This seems to me the just and equitable rule. It is not, however, perhaps, quite the rule which has obtained in the law for settling the question of damages in the case of an illegal conversion of property. * * * I think the rule of damages applicable to cases of this description is reasonably well settled to be as liberal as this in favor of the plaintiff, to wit, to allow to the plaintiff the highest price for the property prevailing between the time of conversion and a reasonable time afterwards for the commencement of the action. Some of the cases carry the period up to the time of trial of a suit commenced within a reasonable time; and, as between these two periods,—the time of commencing the suit, and the time of trial,—the rule is somewhat fluctuating. What this reasonable time shall be has never been definitely settled, and may, perhaps, fluctuate to some extent, according to the circumstances of the particular case."

Though the rule sanctioned in this case differed materially from that adopted in the earlier case, the latter has not been regarded as overruled, but, on the contrary, has been followed in later cases.[54] These cases have been overruled in so far as stock transactions are concerned, on the ground that the loss of the highest intermediate value is not a natural, proximate, or certain result of the wrong. In Baker v. Drake[55] the court said: "This enormous amount of profit, given under the name of damages, could not have been ar-

[54] Burt v. Dutcher, 34 N. Y. 493; Markham v. Jaudon, 41 N. Y. 235; Lobdell v. Stowell, 51 N. Y. 70. See, also, Morgan v. Gregg, 46 Barb. 183; Lawrence v. Maxwell, 6 Lans. 469; Nauman v. Caldwell, 2 Sweeney, 212. In Matthews v. Coe, 49 N. Y. 57, the court distinguished earlier cases, but intimated that the rule was not so firmly settled as to be beyond the reach of review.

[55] 53 N. Y. 211, 215.

rived at except upon the unreasonable supposition, unsupported by any evidence, that the plaintiff not only would have supplied the necessary margin and caused the stock to be carried through all its fluctuation, until it reached its highest point, but that he would have been so fortunate as to seize upon that precise moment to sell, thus avoiding the subsequent decline, and realizing the highest profit which could have possibly been derived from the transaction by one endowed with the supernatural power of prescience." The court held that, in this class of cases, it was the owner's duty to avoid further loss by going into the market and replacing the stock, and that the market price, within a reasonable time after notice of the conversion in which to do so, was the measure of damages. This rule was reaffirmed in a later case,[56] where it was said: "It is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff had learned of the conversion of his stock within which he could go in the market and repurchase it." It was held in this case to be immaterial whether the stock was owned absolutely, or simply carried on margins,—a distinction suggested in the earlier case.

The supreme court of the United States has adopted the rule of the New York court in regard to stock transactions.[57] "It has been assumed, in the consideration of the case, that the measure of damages in stock transactions of this kind is the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter, to be allowed to the party injured to place himself in the position he would have been in had not his rights been violated. This rule is most frequently exemplified in the wrongful conversion by one person of stocks belonging to another. To allow merely their value at the time of conversion would, in most cases, afford a very inadequate remedy, and, in case of a broker, holding the stocks of his principal, it would afford no remedy at all. The effect would be to give to the broker

[56] Wright v. Bank, 110 N. Y. 237, 249, 18 N. E. 79. See, also, Baker v. Drake, 66 N. Y. 518; Gruman v. Smith, 81 N. Y. 25; Colt v. Owens, 90 N. Y. 368.

[57] Galigher v. Jones, 129 U. S. 193, 200, 9 Sup. Ct. 335.

the control of the stock, subject only to nominal damages. The real injury sustained by the principal consists, not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time and for an unfavorable price. Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time; and hence, with regard to them, the ordinary measure of damages is their value at the time of conversion, or, in case of sale and purchase, at the time fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust. The rule of highest intermediate value, as applied to stock transactions, has been adopted in England and in several of the states in this country, while in some others it has not obtained. * * * On the whole, it seems to us that the New York rule, as finally settled by the court of appeals, has the most reasons in its favor, and we adopt it as a correct view of the law."

In Pennsylvania the rule of highest intermediate value was adopted with reference to stock transactions,[58] but not in regard to personal property in general.[59] The rule was afterwards declared applicable only where the defendant was under a contract or trust duty to deliver stock,[60] and still later it was held that the rule did not apply to actions of trover nor to ordinary stock contracts, but only to cases in which there was a trust relation between the parties, and in cases where justice cannot be reached by the ordinary measure of damages.[61]

In Alabama, it is discretionary with the jury to allow such value as they deem proper between the highest value reached before trial and the value at the time of conversion.[62] "This discretion of the jury

[58] Bank of Montgomery Co. v. Reese, 26 Pa. St. 143; Musgrave v. Beckendorff, 53 Pa. St. 310.

[59] Smethurst v. Woolston, 5 Watts & S. 106 (nondelivery of chattels); Neiler v. Kelley, 69 Pa. St. 403 (conversion of pledged stock).

[60] Neiler v. Kelley, 69 Pa. St. 403; Work v. Bennett, 70 Pa. St. 481; Phillips' Appeal, 68 Pa. St. 130.

[61] Huntington & B. T. R. & Coal Co. v. English, 86 Pa. St. 217; North v. Phillips, 89 Pa. St. 250; Wagner v. Peterson, 83 Pa. St. 238. The trust relation would probably be deemed to exist between a stock broker and his client. Galigher v. Jones, 129 U. S. 193, 201, 9 Sup. Ct. 335.

[62] Loeb v. Flash, 65 Ala. 526; Street v. Nelson, 67 Ala. 501; Renfro v.

in selecting the exact period of valuation should be exercised in such a manner as to prevent the defendant from reaping a pecuniary profit through his wrongful act, and at the same time, in proper cases, to permit the special equities or hardships of the particular case so to operate in the mitigation of damages, as exact justice may require." [63]

In Mississippi, the measure of damages is the value at the time of conversion, with interest, except in the following classes of cases: (1) Where the original act was wrongful; (2) where it was bona fide, but the defendant subsequently disposed of the property wrongfully and with knowledge of the plaintiff's claim; (3) where the taking and disposition of the property were both in good faith, but the defendant seeks to retain the excess of the proceeds of the sale over the market value at the time of the conversion "as a speculation"; (4) where the property has some peculiar value to plaintiff, and is willfully taken or withheld by the defendant.[64]

The rule of higher intermediate value has been adopted, with more or less variations, in other jurisdictions, [65] but in perhaps the majority of them it has been denied.[66] In all jurisdictions the action

Hughes, 69 Ala. 581. See, also, Tatum v. Manning, 9 Ala. 144; Ewing v. Blount, 20 Ala. 694; Jenkins v. McConico, 26 Ala. 213; Johnson v. Marshall, 34 Ala. 522. Formerly, in case of nondelivery of goods sold, the rule was not applied. Rose v. Bozeman, 41 Ala. 678.

[63] Burks v. Hubbard, 69 Ala. 379, 384.

[64] Whitfield v. Whitfield, 40 Miss. 352, 367. See, also, Bickell v. Colton, 41 Miss. 368.

[65] Cannon v. Folsom, 2 Iowa, 101; Harrison v. Charlton, 37 Iowa, 134; Gilman v. Andrews, 66 Iowa, 116, 23 N. W. 291; Ellis v. Wire, 33 Ind. 127; Gregg v. Fitzhugh, 36 Tex. 127; Randon v. Barton, 4 Tex. 289; Brasher v. Davidson, 31 Tex. 190; Kid v. Mitchell, 1 Nott & McC. 334. And see Pickert v. Rugg, 1 N. D. 230, 46 N. W. 446.

[66] Kennedy v. Whitwell, 4 Pick. 466; Greenfield Bank v. Leavitt, 17 Pick. 1; Gray v. Bank, 3 Mass. 364; Hussey v. Bank, 10 Pick. 415; Fisher v. Brown, 104 Mass. 259 (but see Maynard v. Pease, 99 Mass. 555); Brewster v. Van Liew, 119 Ill. 554, 8 N. E. 842; Galena & S. W. R. Co. v. Ennor, 123 Ill. 505, 14 N. E. 673; Smith v. Dunlap, 12 Ill. 184; Cushman v. Hayes, 46 Ill. 145; Bates v. Stansell, 19 Mich. 91; Jackson v. Evans, 44 Mich. 510, 7 N. W. 79; Ingram v. Rankin, 47 Wis. 406, 2 N. W. 755; Noonan v. Ilsley, 17 Wis. 314; White v. Salisbury, 33 Mo. 150; Walker v. Borland, 21 Mo. 289; Pinkerton v. Railroad Co., 42 N. H. 424, 463; Enders v. Board, 1 Grat. 364;

must be brought within a reasonable time, or the rule does not apply.[67]

MEDIUM OF PAYMENT—LEGAL TENDERS.

81. Damages must be assessed and paid in domestic money.

82. Money means coin, in the absence of statutes declaring something else a legal tender.

Damages must be assessed and paid in money,[68] and, in the absence of statute, money means coin.[69] It would be a simple matter, ordinarily, to estimate the amount due on a contract for the payment of money, if there were but a single standard of money, and that standard remained unchanged between the time of contract and the date of payment. But where there are two or more standards of different intrinsic value, or where the standard has been changed, difficult problems may arise.

By the legal tender acts,[70] it was declared that certain treasury notes of the United States should be a legal tender in payment of debts. The effect of these acts was to establish a new and additional standard of money, nominally, but not intrinsically, equal to the old. It was decided that the acts were constitutional, and applied to antecedent as well as subsequent contracts.[71] Many exceedingly important and difficult questions thereupon arose, such as

Third Nat. Bank of Baltimore v. Boyd, 44 Md. 47; Baltimore City Passenger Ry. Co. v. Sewell, 35 Md. 238; Andrews v. Clark, 72 Md. 396, 20 Atl. 429; Fosdick v. Greene, 27 Ohio St. 484; Arrington v. Railroad Co., 6 Jones (N. C.) 68 (but see Boylston Ins. Co. v. Davis, 70 N. C. 485).

[67] If there is an unreasonable delay, the measure of damages is the value at the time of the injury. Heilbroner v. Douglass, 45 Tex. 402.

[68] Sedg. Dam. § 266.

[69] Field, Dam. § 216; Gwin v. Breedlove, 2 How. (U. S.) 29.

[70] Rev. St. U. S. 1875, p. 712, c. 39, § 3589; 12 Stat. 345; Id. 709; Id. 218.

[71] Knox v. Lee; Parker v. Davis (legal tender cases) 12 Wall. (U. S.) 457; Dooley v. Smith, 13 Wall. (U. S.) 604; Juilliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. 122. These cases overruled Hepburn v. Griswold, 8 Wall. (U. S.) 603, which held the acts unconstitutional as to antecedent contracts. The state courts generally sustained the acts. See Metropolitan Bank v. Van Dyck, 27 N. Y. 400; Meyer v. Roosevelt, Id.; Lewis v. Railroad Co., 6 Am. Law Reg. (N. S.) 703; Lick v. Faulkner, 25 Cal. 404; Van Husan v. Kanouse, 13 Mich. 303; Wood v. Bullens, 6 Allen, 516.

the right of parties to stipulate for payment in gold, and the form of judgment on such a contract.

The result of the decisions under the legal tender acts has been admirably summed up by Mr. Field as follows:* "(1) That, where a contract provides for the payment of money within the United States and contains no stipulation as to the kind of money, it will be satisfied by a tender of the nominal amount in legal tender notes; and the measure of damages in an action on such a contract is the nominal amount due in legal tender notes.[72] (2) That, if gold or silver coin is applied in payment of such a claim, in the absence of a special contract in relation thereto, it will be applied at its nominal value; and it satisfies to the same extent, and no more, as a payment of an equal nominal amount in legal tender notes.[73] (3) That, where a contract provides specifically for payment in gold or silver coin, the coin must be paid,[74] and damages for the breach of such

* Field, Dam. 222.

[72] Sedg. Dam. § 269. Where gold is deposited in bank, payment may be made in legal tender paper. Aurentz v. Porter, 56 Pa. St. 115. See, also, Thompson v. Riggs, 5 Wall. 663, and Marine Bank v. Fulton Bank, 2 Wall. 252. A judgment rendered before the passage of the act is satisfied by payment in legal tender paper (Bowen v. Clark, 46 Ind. 405), though it was for a debt created by the loan of gold (McInhill v. Odell, 62 Ill. 169). See, also, Belloc v. Davis, 38 Cal. 242; Longworth v. Mitchell, 26 Ohio St. 334.

[73] Hancock v. Franklin Ins. Co., 114 Mass. 155; Stanwood v. Flagg, 98 Mass. 124; Stark v. Coffin, 105 Mass. 328.

[74] Bronson v. Rodes, 7 Wall. 229. In Butler v. Horwitz, Id. 258, 260, Chase, C. J., said: "A contract to pay a certain sum in gold and silver coin is, in substance and legal effect, a contract to deliver a certain weight of gold and silver of a certain fineness, to be ascertained by count. Damages for nonperformance of such a contract may be recovered at law as for nonperformance of a contract to deliver bullion or other commodity. But whether the contract be for the delivery or payment of coin, or bullion, or other property, damages for nonperformance must be assessed in lawful money,—that is to say, in money declared to be legal tender in payment. * * * We find two descriptions of lawful money in use under acts of congress, in either of which damages for nonperformance of contracts, whether made before or since the passage of the currency acts, may be properly assessed, in the absence of any different understanding or agreement between parties. But the obvious intent, in contracts for the payment or delivery of coin or bullion, to provide against fluctuations in the medium of payment, warrants the inference that it was the understanding of the parties that such contracts

a contract should be assessed in coin for the nominal amount; and judgment should be rendered for the coin stipulated, and not for its equivalent value in treasury legal tender notes; and such a judgment can only be satisfied by specie payment." [75]

Foreign Currency.

Foreign currency is considered merely as a commodity, and, accordingly, wherever such currency is involved, judgment is given for its value in domestic money.[76] As the value is to be estimated as

should be satisfied, whether before or after judgment, only by tender of coin, which the absence of any express stipulation as to description, in contracts for payment in money generally, warrants the apposite inference of an understanding between parties that such contracts may be satisfied, before or after judgment, by the tender of any lawful money. * * * When, therefore, it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold or silver, damages should be assessed and judgment rendered accordingly."

[75] The Emily Souder, 17 Wall. 666; Chisholm v. Arrington, 43 Ala. 610; Bowen v. Darby, 14 Fla. 202; Stringer v. Coombs, 62 Me. 160; Chesapeake Bank v. Swain, 29 Md. 483; Independent Ins. Co. v. Thomas, 104 Mass. 192; Warren v. Franklin Ins. Co., Id. 518; Stark v. Collin, 105 Mass. 328; Currier v. Davis, 111 Mass. 480; Whitney v. Thacher, 117 Mass. 523; Chrysler v. Renois, 43 N. Y. 209; Phillips v. Speyers, 49 N. Y. 653; Quinn v. Lloyd, 1 Sweeney, 253; Phillips v. Dugan, 21 Ohio St. 466; Bridges v. Reynolds, 40 Tex. 205; Johnson v. Stallcup, 41 Tex. 527. In some states, gold was treated like ordinary merchandise, and its value was assessed in paper. Baker's Appeal, 59 Pa. St. 313; Frank v. Calhoun, Id. 381; Dunn v. Barnes, 73 N. C. 273; Wills v. Allison, 4 Heisk. 385; Bond v. Greenwald, Id. 453. In Kellogg v. Sweeney, 46 N. Y. 291, it was held that, in actions of tort for the loss of gold, judgment should be entered in gold coin, and not its then equivalent in paper. Contra, Cushing v. Wells, 98 Mass. 550.

[76] Pollock v. Colglazure, Sneed (Ky.) 2; Sheehan v. Dalrymple, 19 Mich. 239; Fabbri v. Kalbfleisch, 52 N. Y. 28; Colton v. Dunham, 2 Paige, 267; Mather v. Kinike, 51 Pa. St. 425; Christ Church Hospital v. Fuechsel, 54 Pa. St. 71; Nova Scotia Tel. Co. v. American Tel. Co., 4 Am. Law Reg. (N. S.) 365. In Robinson v. Hall, 28 How. Prac. 312, and Hawes v. Woolcock, 26 Wis. 629, it was held that the value of foreign currency should be estimated at the date of the trial or judgment, instead of at the date of performance. But this cannot be sound if foreign currency is regarded as a commodity. But a contract which is a money contract where entered into is a money contract everywhere. To this extent foreign currency differs from a mere chattel or commodity. Such a contract may be declared on in debt, or in assumpsit, for money had and received, money lent, etc. Suth.

of the place of performance, the rate of exchange must be added or subtracted.[77]

Mercantile Securities.

A contract payable in mercantile securities is in effect a contract to deliver commodities; and the damages for a breach is the actual, and not the face, value of the securities.[78]

Alternative Medium.

Where the parties stipulate for an alternative medium of payment, the least beneficial alternative is the measure of damages for a breach.[79]

Contract to Pay in Commodities.

There is a conflict of decisions as to the measure of damages for breach of an agreement to pay a certain sum in commodities at a certain rate. In some jurisdictions, such a contract is construed as an agreement to deliver commodities, and the damages for a breach is the value of the articles at that time.[80] In other jurisdictions, it

Dam. § 205. A contract for the payment of foreign gold is merely a contract for a commodity, and judgment thereon need not be entered in gold. It is not a contract for the payment of gold dollars. Sedg. Dam. § 274; Marburg v. Marburg, 26 Md. 8; Ladd v. Arkell, 40 N. Y. Super. Ct. 150; Benners v. Clemens, 58 Pa. St. 24. Contra, Stringer v. Coombs, 62 Me. 160.

[77] Story, Confl. Laws, §§ 302, 308; Sedg. Dam. § 275; Lanusse v. Barker, 3 Wheat. 101, 147; Woodhull v. Wagner, Baldw. 296, 302, Fed. Cas. No. 17,975; Grant v. Healey, 3 Sumn. 523, Fed. Cas. No. 5,696; Smith v. Shaw, 2 Wash. C. C. 167, Fed. Cas. No. 13,107; Cropper v. Nelson, 3 Wash. C. C. 125, Fed. Cas. No. 3,417; Hargrove v. Creighton, 1 Woods, 489, Fed. Cas. No. 6,064; Lee v. Wilcocks, 5 Serg. & R. 48. In New York and Massachusetts no allowance is made for the rate of exchange between the place where the suit is brought and the place where the debt is payable. Adams v. Cordis, 8 Pick. 260; Cary v. Courteney, 103 Mass. 316; Martin v. Franklin, 4 Johns. 124; Scofield v. Day, 20 Johns. 102. See Guiteman v. Davis, 45 Barb. 576, note; Ladd v. Arkell, 40 N. Y. Super. Ct. 150.

[78] Williams v. Sims, 22 Ala. 512; Parks v. Marshall, 10 Ind. 20; Jones v. Chamberlain, 30 Vt. 196; Moore v. Fleming, 34 Ala. 491; Marr's Adm'r v. Prather, 3 Metc. (Ky.) 196; Williams v. Jones, 12 Ind. 561; Pierce v. Spader, 13 Ind. 458.

[79] Hixon v. Hixon, 7 Humph. 33. See ante, p. 141.

[80] Price v. Justrobe, Harp. (S. C.) 111; Wilson v. George, 10 N. H. 445; M'Donald v. Hodge, 5 Hayw. (Tenn.) 85; Meserve v. Ammidon, 109 Mass. 415; Rose v. Bozeman, 41 Ala. 678; Davenport v. Wells, 1 Iowa, 598; Cole

is held that such a contract merely gives the debtor an election to pay in commodities instead of in money, and that such right is waived by failure to exercise it at the time agreed upon, and thereafter payment must be made in money.[81] We apprehend that the former rule is more consistent with the principle of compensation.

v. Ross, 9 B. Mon. 393; Lyles v. Lyles' Ex'rs, 6 Har. & J. 273; Noonan v. Ilsley, 17 Wis. 314.

[81] Gleason v. Pinney, 5 Cow. 152; 5 Wend. 393; Brooks v. Hubbard, 3 Conn. 58; Perry v. Smith, 22 Vt. 301; Trowbridge v. Holcomb, 4 Ohio St. 38; Short v. Abernathy, 42 Tex. 94; Cummings v. Dudley, 60 Cal. 383; Heywood v. Heywood, 42 Me. 229.

CHAPTER VII.

EXEMPLARY DAMAGES.

§§ 83-84. In General.
§§ 85-86. When Recoverable.
§ 87. Liability of Principal for Act of Agent.

IN GENERAL.

83. Exemplary, punitive, or vindictive damages are damages awarded in addition to compensation as a punishment to the defendant, and as a warning to other wrongdoers.*

84. The authorities are in great conflict as to whether exemplary damages can ever be allowed.

(a) In some jurisdictions, exemplary damages cannot be recovered.

(b) In a few jurisdictions, exemplary damages, so called, may be recovered, but they are, in fact, compensatory.

(c) In most jurisdictions, exemplary damages may be recovered in cases of aggravated torts.

Nature and Origin of the Doctrine.

It is now a well-established principle in many jurisdictions that, in actions of tort, a jury may inflict what are called exemplary, punitive, or vindictive damages upon the defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.[1] Upon this principle, whenever the defendant, in committing the wrong complained of, acted recklessly, or willfully and maliciously, with a design to oppress and injure the plaintiff, in fix-

* Exemplary damages at common law are damages inflicted by way of punishment and warning. Mayer v. Frobe (W. Va.) 22 S. E. 58.

1 Day v. Woodworth, 13 How. 363, 371.

ing the damages, the jury may disregard the rule of compensation, and award, beyond that, an additional sum, such as, in their discretion, they deem proper, as a punishment to defendant and as a protection to society against a violation of personal rights and social order.[2] The rule applies, also, in actions for willful injuries to property, and in actions of tort founded on negligence, amounting to misconduct or recklessness. This doctrine has been repeatedly attacked, and is open to objections hard to answer. It is undoubtedly true that the allowance of anything more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded.[3] Even Mr. Sedgwick, who supported the doctrine in a controversy with Mr. Greenleaf, admits "that it is an exceptional or anomalous doctrine, at variance with the general rule of compensation; hence that, logically, it is wrong."[4] The principle owes its origin to the old rule that the jury were the sole judges of the damages.[5] Then, as now, when a wrong was accompanied by circumstances of aggravation, the jury was prone to return a verdict for large damages, which the court was powerless to set aside. The early cases amount to no more than a refusal to set aside such verdicts;[6] but, from the intemperate language sometimes used by the judges in justifying the verdict, the doctrine of exemplary damages sprung up, well characterized as "a sort of hybrid between a display of ethical indignation, and the imposition of a criminal fine." The principle was also confused with that allowing compensation for mental suffering; the circumstances of aggravation

[2] Voltz v. Blackmar, 64 N. Y. 440, 444.

[3] Milwaukee & St. P. Ry. Co. v. Arms, 91 U. S. 489.

[4] Sedgw. Dam. § 353.

[5] Sedgw. Dam. § 354.

[6] See Huckle v. Money, 2 Wils. 205, and concurring opinion of Bathurst, J.; Beardmore v. Carrington, Id. 244; Grey v. Grant (C. B. Trin., 4 Geo. III.) Id. 252; Sayer, Dam. 227; Tullidge v. Wade, 3 Wils. 18; Merest v. Harvey, 5 Taunt. 442; Sears v. Lyons, 2 Starkie, 317; Doe v. Filliter, 13 Mees. & W. 47; Rogers v. Spence, Id. 571; Merrills v. Manufacturing Co., 10 Conn. 384. In these cases the term "actual damage" seems to be confined to pecuniary losses. The idea seems to be that reparation for mental suffering (i. e. "sense of wrong or insult") could only be made by way of punishment; that such injuries could not be compensated.

which would justify exemplary damages being generally such as would naturally cause mental suffering.[7]

It was said, in a leading case in New Hampshire,[8] that the modern erroneous idea of exemplary damages "originated in, and is, in fact, the same thing as, damages for wounded feelings, as distinguished from damages for an injury to the person or property. Damages for lacerated sensibilities, insulted honor, tyrannical oppression, etc., being much emphasized and often being the principal damage suffered by the plaintiff, and language being loosely used, and not preserving the true distinction carefully, or intemperately used in the heat of indignation which judges often felt and could not repress while contemplating an enormous outrage, it finally came to be understood that damages might be given in a civil suit as a punishment for an offense against the public,—an idea that is certainly not plainly declared in the early cases. * * * I venture to say that no case will be found in ancient—nor, indeed, in modern—reports in which a judge explicitly told a jury that they might, in an action for assault and battery, give the plaintiff four damages, viz.: (1) For loss of property, as for injury to his apparel, loss of labor and time, expenses of surgical assistance, nursing, etc.; (2) for bodily pain; (3) for mental suffering; and (4) for punishment of defendant's crime. But a critical examination of the cases will show, as I believe, that the fourth item is, in fact, comprehended in

[7] "If compensation were now understood, as it formerly was, to be made for injuries to material substance only, and exemplary damages were now understood, as they were formerly, to refer to injuries to the spiritual or mental part of human nature, there would be no trouble or difficulty in the matter; but in progress of time these definitions have changed. Compensatory damages now include injuries to the mental and spiritual part of mankind; and this change of definition, leaving nothing for 'exemplary damages,' as formerly understood, to operate upon and be applied to, by a very natural mistake the term 'exemplary' has been supposed to refer to criminal punishment for the sake of public example,—an idea that was not included in 'exemplary damages', as formerly understood." Fay v. Parker, 53 N. H. 342, 384. Cf. Wiggin v. Coffin, 3 Story, 1, Fed. Cas. No. 17,624; King v. Root, 4 Wend. 113, 139; Cook v. Ellis, 6 Hill, 466; Burr v. Burr, 7 Hill, 207, 217; Kendall v. Stone, 2 Sandf. 269; Stimpson v. Railroads, 1 Wall. Jr. 164, 170, Fed. Cas. No. 13,456; Grable v. Margrave, 3 Scam. 373; Johnson v. Weedman, 4 Scam. 495; McNamara v. King, 2 Gilman, 432; Day v. Woodworth, 13 How. 363, 371.

[8] Fay v. Parker, 53 N. H. 342, 380.

the third, but has grown into and become a separate and additional item, by inconsiderate, if not intemperate and angry, instructions, given to juries when the court was too much incensed by the exhibition of wanton malice, revenge, insult, and oppression, to weigh with coolness and deliberation the meaning of language used by other judges."

Criticism of the Doctrine.

In giving the elements of damages Mr. Sedgwick distinguishes between "the mental suffering produced by the act or omission in question; vexation; anxiety,"—which he holds to be grounds for compensatory damages,—and "the sense of wrong or insult in the sufferer's breast, from an act dictated by a spirit of willful injustice, or by a deliberate intention to vex, degrade, or insult,"—which he holds to be ground for exemplary damages only.[9] He maintains that the rule in favor of exemplary damages blends together the interests of society and the aggrieved individual, and gives damages, not only to recompense the sufferer, but to punish the offender, and that exemplary damages are in addition to actual damages.[11] We need add no authority to Mr. Sedgwick's, that, in actions for personal torts, mental suffering, vexation, and anxiety are subjects for compensation in damages; and it is difficult to see any distinction between these and the sense of wrong and insult arising from injustice and intention to vex and degrade.[12] The appearance of malicious intent may add to the sense of wrong; and equally whether such intent be really there or not. But that goes to mental suf-

[9] Sedgw. Dam. §§ 37, 347.

[11] "Damages for wounded feelings are compensatory in their nature. * * * Exemplary damages are given because of the motive of the defendant, and it is well settled that when they are allowed it is in addition to compensatory damages for either physical or mental suffering." Sedgw. Dam. § 357; Harrison v. Ely, 120 Ill. 83, 11 N. E. 334; Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. 864; Root v. Sturdivant, 70 Iowa, 55, 29 N. W. 802; Haines v. Schultz, 50 N. J. Law, 481, 14 Atl. 488, Hamilton v Railroad Co., 35 N. Y. Super. Ct. 118; Croker v. Railway Co., 36 Wis. 657.

[12] In assessing damages for an assault and battery, the jury may consider, as an aggravation of the tort, the mental suffering of the plaintiff from the insult and indignity of defendant's blows. Smith v. Holcomb, 99 Mass. 552. See, also, Brown v. Swineford, 44 Wis. 282, 289.

fering, and mental suffering to compensation.[13] It has been thought that this is a mere verbal criticism,—a controversy as to the terminology of the law rather than as to the extent of the right of recovery, or real measure of damages; that what is given in some jurisdictions as exemplary damages is recovered in others as compensation for mental suffering, i. e. "the sense of wrong and insult." [14] This would be true if the question were simply whether certain elements of damage are to be regarded as compensatory or exemplary, the plaintiff in either event getting the advantage of them; but it manifestly becomes a matter of more than verbal consequence if the plaintiff is to receive and the defendant is to pay for the same elements of injury and damage twice,—once as compensatory, and again as exemplary. A fortiori, it is of more than verbal consequence if the defendant is required to pay for the same thing a third time, by a fine, for the benefit of the public. It is of no consequence whether damages given for insult and oppression are called "exemplary" or "compensatory," until fundamental constitutional rights are imperiled and overthrown by a misconception of the meaning of words. Then it becomes high time to express ideas in language that cannot be misunderstood.[15]

Where the wrong is at once a tort and a crime, there are still graver objections to the doctrine.[16] Exemplary damages, in addition to full compensation for the injury suffered, subject the wrongdoer to punishment twice for the same offense; and, moreover, while the statute limits the pecuniary fine upon a criminal prosecution for such an act, there is but a vague limit to the exemplary damages which a jury may find in a civil action. It certainly appears to be an incongruity that one may be punished by the public, for the

[13] Craker v. Railway Co., 36 Wis. 657.

[14] Sedgw. Dam. §§ 347, 354.

[15] Fay v. Parker, 53 N. H. 342.

[16] "To punish a defendant civilly, by fine, is to violate not only the constitutional immunity, and also the synonymous maxim of the common law, 'Nemo debet bis puniri,' but also the other maxim (also synonymous), 'Nemo debet bis vexari pro una et eadem causa.' * * * This privilege is secured to every American citizen, as firmly as the inalienable rights of life, liberty, or the pursuit of happiness, namely, he shall not be liable to be tried after an acquittal, nor twice vexed, nor twice punished, nor twice tried, nor twice put in jeopardy." Fay v. Parker, 53 N. H. 342, 388, 389.

crime, upon a criminal prosecution, by a fine limited by statute, and again punished in favor of the sufferer, but in right of the public, for the same act, by exemplary damages, with little limit but the discretion of the jury. This is but another illustration of what appears to be the incongruity of the entire rule of exemplary damages.[17]

When all is said, it must be admitted that the doctrine of exemplary damages is anomalous and illogical. "It has been suffered to lean upon and support itself by the supposed weight of authority rather than to stand upon principle and inherent strength."[18] The fact remains, however, that in a vast body of decisions damages have been allowed strictly in pœnam. The doctrine of these cases is to be sustained, if at all, mainly on the ground of authority.[19]

Jurisdictions in Which Exemplary Damages Cannot be Recovered.

In some jurisdictions the entire doctrine of exemplary damages is repudiated. Full compensation for all the elements of damage suffered, including mental suffering, i. e. "sense of wrong and insult," is the measure and limit of recovery. Thus Cooley, C. J., said, in a leading Michigan case:[20] "The purpose of an action for tort is to recover the damages which the plaintiff has sustained from an injury done him by the defendant. In some cases the damages are incapable of pecuniary estimation, and the court performs its duty in submitting all the facts to the jury, and leaving them to estimate the plaintiff's damages as best they may under all the circumstances. In other cases there may be a partial estimate of damages by a money standard, but the invasion of the plaintiff's rights has been accompanied by circumstances of peculiar aggravation, which are calculated to vex and annoy the plaintiff, and cause him to suffer much beyond what he would suffer from the pecuniary loss. Here it is manifestly proper that the jury should estimate the damages with the aggravating circumstances in mind, and that they should endeavor fairly to compensate the plaintiff for the wrong he has suffered. But in all cases it is to be distinctly borne in mind

[17] Brown v. Swineford, 44 Wis. 285.

[18] Field, Dam. p. 79.

[19] Sedgw. Dam. § 354.

[20] Stilson v. Gibbs, 53 Mich. 280, 18 N. W. 815. See, also, Wilson v. Bowen 64 Mich. 133, 31 N. W. 81.

that compensation to the plaintiff is the purpose in view, and any instruction which is calculated to lead them to suppose that, besides compensating the plaintiff, they may punish the defendant, is erroneous." In this case, the instruction complained of authorized the jury, after estimating the actual damages of the plaintiff, to go further and give an additional sum, limited only by their discretion, by way of punishment and example, and for that reason was held erroneous. The rule is the same in Massachusetts, where it is held [21] that the "manner and manifest motive" of a tort may be shown in proof of mental suffering. Exemplary damages have been denied in other jurisdictions.[22]

Jurisdictions Where Exemplary Damages are Compensatory.

In West Virginia the doctrine that, in a civil case, punitive, vindictive, or exemplary damages can be imposed as a mere punishment to the defendant, was originally repudiated,[23] and it was held, upon a review of the cases, that the term "exemplary damages," when properly used, meant merely compensation for mental suffering, and not additional damages given as a punishment.[24] Damages called "exemplary" were held recoverable, but they were distinctly held to be compensatory. These cases have been recently overruled in an elaborate opinion which relies principally upon Scriptural authority.* The original West Virginia doctrine is maintained in a few jurisdictions.[25] In Texas, under the name of "exemplary damages," compensation may be recovered for items of damage which would ordinarily be excluded as remote; but it seems that damages cannot be given as a punishment.[26]

[21] Hawes v. Knowles, 114 Mass. 518.

[22] Murphy v. Hobbs, 7 Colo. 541, 5 Pac. 119; Greeley, S. L. & P. Ry. Co. v. Yeager, 11 Colo. 345, 18 Pac. 211; Riewe v. McCormick, 11 Neb. 261, 9 N. W. 88; Fay v. Parker, 53 N. H. 342; Bixby v. Dunlap, 56 N. H. 456.

[23] Beck v. Thompson, 31 W. Va. 459, 7 S. E. 447.

[24] Pegram v. Stortz, 31 W. Va. 220, 6 S. E. 485.

* Mayer v. Frobe (W. Va.) 22 S. E. 58.

[25] Quigley v. Railroad Co., 11 Nev. 350; Union Pac. R. Co. v. Hause, 1 Wyo. 27.

[26] Biering v. Bank, 69 Tex. 599, 7 S. W. 90; International & G. N. R. Co. v. Telephone & Tel. Co., 69 Tex. 277, 5 S. W. 517. In some jurisdictions the expenses of litigation may be considered in assessing exemplary damages. Marshall v. Betner, 17 Ala. 833; Patton v. Garrett, 37 Ark. 605; Huntley v.

WHEN RECOVERABLE.

85. In jurisdictions where exemplary damages are allowed, they can be recovered only in actions of tort, and when the tort is accompanied by violence, oppression, gross negligence, malice, or fraud.

EXCEPTIONS—(a) Exemplary damages may be recovered for breach of promise of marriage (p. 213).

(b) In a few states exemplary damages may be recovered in an action on a statutory bond, where the breach of condition was a tort (p. 213).

(c) In some jurisdictions, exemplary damages cannot be recovered where the tort is also a crime (p. 215).

86. Liability to exemplary damages does not survive.

In most jurisdictions the doctrine has become firmly established that exemplary damages, in addition to compensation for the loss actually suffered, may be awarded as a punishment to defendant, and as a warning to others.[27] But a civil action does not lie merely

Bacon, 15 Conn. 267; Beecher v. Ferry Co., 24 Conn. 491; Dalton v. Beers, 38 Conn. 529; Bennett v. Gibbons, 55 Conn. 450, 12 Atl. 99; Wynne v. Parsons, 57 Conn. 73, 17 Atl. 362; Titus v. Corkins, 21 Kan. 722; Winstead v. Hulme, 32 Kan. 568, 4 Pac. 994; Eatman v. Railway Co., 35 La. Ann. 1018; Northern, J. & G. N. R. R. Co. v. Allbritton, 38 Miss. 243; Roberts v. Mason, 10 Ohio St. 277; Finney v. Smith, 31 Ohio St. 529; Stevenson v. Morris, 37 Ohio St. 10; Peckham Iron Co. v. Harper, 41 Ohio St. 100. See ante, p. —. Contra, Hoadley v. Watson, 45 Vt. 289.

[27] Emblen v. Myers, 6 Hurl. & N. 54; Bell v. Railway Co., 4 Law T. (N. S.) 293; Day v. Woodworth, 13 How. 363; Milwaukee & St. P. Ry. Co. v. Arms, 91 U. S. 489; Missouri Pac. Ry. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110; Denver & R. G. Ry. Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286; Brown v. Evans, 8 Sawy. 488, 17 Fed. 912; U. S. v. Taylor, 35 Fed. 484; Jefferson Co. Sav. Bank v. Eborn, 84 Ala. 529, 4 South. 386; Clark v. Bales, 15 Ark. 452; Citizens' St. Ry. Co. v. Steen, 42 Ark. 321; St. Ores v. McGlashen, 74 Cal. 148, 15 Pac. 452; Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668; Linsley v. Bushnell, 15 Conn. 225; Dalton v. Beers, 38 Conn. 529; Robinson v. Burton, 5 Har. (Del.) 335; Coleman v. Allen, 79 Ga. 637, 5 S. E. 201; Harrison v. Ely, 120 Ill. 83, 11 N. E. 331; Binford v. Young, 115 Ind. 174, 16 N. E. 142; Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. 861; Root v. Sturdivant, 70 Iowa,

to inflict punishment. A cause of action must exist independently of the claim for exemplary damages. In other words, where damages are the gist of an action, proof of aggravating circumstances, such as would ordinarily justify the infliction of exemplary damages, is alone insufficient to maintain the action. Some actual loss must be proved.[28] Where a wrongdoer dies before trial, only compensatory damages can be recovered against his estate. The liability to exemplary damages does not survive.[29] In an action

55, 29 N. W. 802; Redfield v. Redfield, 75 Iowa, 435, 39 N. W. 688; Thill v. Pohlman, 76 Iowa, 638, 41 N. W. 385; Wheeler & Wilson Manuf'g Co. v. Boyce, 36 Kan. 350, 13 Pac. 609; Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 3 S. W. 530; Pike v. Dilling, 48 Me. 539; Webb v. Gilman, 80 Me. 177, 13 Atl. 688; Baltimore & Y. Turnpike v. Boone, 45 Md. 344; Philadelphia, W. & B. R. Co. v. Larkin, 47 Md. 155; McPherson v. Ryan, 59 Mich. 33, 26 N. W. 321; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695; Newman v. Stein, 75 Mich. 402, 42 N. W. 956. Contra, Stilson v. Gibbs, 53 Mich. 280, 18 N. W. 815; Wilson v. Bowen, 64 Mich. 133, 31 N. W. 81; McCarthy v. Niskern, 22 Minn. 90; Peck v. Small, 35 Minn. 465, 29 N. W. 69; Vicksburg & M. R. Co. v. Scanlan, 63 Miss. 413; Higgins v. Railroad Co., 64 Miss. 80, 8 South. 176; Buckley v. Knapp, 48 Mo. 152; Joice v. Branson, 73 Mo. 28; Bohm v. Dunphy, 1 Mont. 333; Magee v. Holland, 27 N. J. Law, 86; Haines v. Schultz, 50 N. J. Law, 481, 14 Atl. 488; Bergmann v. Jones, 94 N. Y. 51; Johnson v. Allen, 100 N. C. 131, 5 S. E. 666; Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342; Knowles v. Railroad Co., 102 N. C. 59, 9 S. E. 7; Atlantic & G. W. Ry. Co. v. Dunn, 19 Ohio St. 162; Hayner v. Cowden, 27 Ohio St. 292; Lake Shore & M. S. Ry. Co. v. Rosenzweig, 113 Pa. St. 519, 6 Atl. 545; Philadelphia Traction Co. v. Orbann, 119 Pa. St. 37, 12 Atl. 816; Kenyon v. Cameron, 17 R. I. 122, 20 Atl. 233; Quinn v. Railway Co., 29 S. C. 381, 7 S. E. 614; Polk v. Fancher, 1 Head (Tenn.) 336; Jones v. Turpin, 6 Heisk. (Tenn.) 181; Cox v. Crumley, 5 Lea (Tenn.) 529; Louisville, N. & G. S. R. Co v. Guinan, 11 Lea (Tenn.) 98; Rea v. Harrington, 58 Vt. 181, 2 Atl. 475; Camp v. Camp, 59 Vt. 667, 10 Atl. 748; Borland v. Barrett, 76 Va. 128; Harman v. Cundiff, 82 Va. 239; McWilliams v. Bragg, 3 Wis. 424; Spear v. Hiles, 67 Wis. 350, 30 N. W. 506; Sullivan v. Navigation Co., 12 Or. 392, 7 Pac. 508; Henchy v. Smith, 10 Or. 349; Day v. Holland, 15 Or. 464, 15 Pac. 855. The estate of a lunatic is not liable for exemplary damages. McIntyre v. Sholty, 121 Ill. 660, 13 N. E. 239.

[28] Meidel v. Anthis, 71 Ill. 241; Schippel v. Norton, 38 Kan. 567, 16 Pac. 804; Stacy v. Publishing Co., 68 Me. 279; Ganssly v. Perkins, 30 Mich. 492; Robinson v. Goings, 63 Miss. 500; Jones v. Matthews, 75 Tex. 1, 12 S. W. 823. A right to recover nominal damages is sufficient to sustain a verdict for exemplary damages. Wilson v. Vaughn, 23 Fed. 229; Hefley v. Baker, 19 Kan. 9.

[29] Edwards v. Ricks, 30 La. Ann. 926; Rippey v. Miller, 11 Ired. 247;

against joint wrongdoers, the bad motives of some of the defendants will not be imputed to the others, and therefore exemplary damages cannot be recovered unless all of the defendants acted so as to become liable therefor.[30] The plaintiff has an election to sue joint tort feasors, either jointly or severally. By suing them jointly, he waives any claim for exemplary damages, unless all acted from bad motives.[31] In such a case, the measure of damage is the actual loss sustained from the joint wrong. To recover exemplary damages, the suit should be against the party who alone acted so as to incur the liability.[32] "It would be very unjust to make the malignant motive of one party a ground of aggravation of damage against the other party, who was altogether free from any improper motive. In such case, the plaintiff ought to select the party against whom he means to get the aggravated damages." [33] Where the plaintiff has no election, but must join all the defendants, exemplary damages are not waived. Thus, where husband and wife must be sued jointly for a tort of the wife, judgment for exemplary damages may be given against both.[34]

Exemplary damages, being designed to punish the wrongdoer, can be justified only where the wrong was willful or wanton, and their allowance is limited to that class of cases.[35] Actual malice,[36] wan-

Wright v. Donnell, 34 Tex. 291. Vindictive damages are awarded as a punishment against a wrongdoer, and not as compensation for the injured person. Therefore they cannot be given in an action against personal representatives of a decedent on account of the wrong of decedent. Sheik v. Hobson, 64 Iowa, 146, 19 N. W. 875.

[30] Suth. Dam. § 407.

[31] McCarthy v. De Armit, 99 Pa. St. 63. It was held that damages should be assessed against the least culpable defendant, and, unless all the defendants were liable for exemplary damages, none could be recovered.

[32] Becker v. Dupree, 75 Ill. 167.

[33] Clark v. Newsam, 1 Exch. 131.

[34] Munter v. Bando, 1 Mo. App. 184; Lombard v. Batchelder, 58 Vt. 558, 5 Atl. 511. See 3 Suth. Dam. c. 26.

[35] Reeder v. Purdy, 48 Ill. 261; Farwell v. Warren, 70 Ill. 28; Toledo, W. & W. Ry. Co. v. Roberts, 71 Ill. 540; Miller v. Kirby, 74 Ill. 242; Scott v. Bryson, Id. 420; Becker v. Dupree, 75 Ill. 167; Moore v. Crose, 13 Ind. 30; Brown v. Allen, 35 Iowa, 306; Tyson v. Ewing, 3 J. J. Marsh. 185; Elliott v. Heiz, 29 Mich. 202; Jockers v. Borgman, 29 Kan. 109; Dow v. Julien, 32 Kan. 576, 1

[36] See note 36 on following page.

tonness,[37] oppression, brutality, insult,[38] fraud,[39] or gross negligence[40] are sufficient to justify the allowance of exemplary dam-

Pac. 1000; Wanamaker v. Bowes, 36 Md. 42. Lack of reasonable grounds for believing allegations made to procure an attachment will not justify exemplary damages. Nordhaus v. Peterson, 54 Iowa, 68, 6 N. W. 77. Exemplary damages cannot be recovered for accidental or unintentional injuries. Walker v. Fuller, 29 Ark. 448; Tripp v. Grouner, 60 Ill. 474; Waller v. Waller, 76 Iowa, 513, 41 N. W. 307; Jackson v. Schmidt, 14 La. Ann. 818; Blodgett v. Brattleboro, 30 Vt. 579; U. S. v. Taylor, 35 Fed. 484; Ames v. Hilton, 70 Me. 36; Sapp v. Railway Co., 51 Md. 115. An idiot is not liable for exemplary damages. McIntyre v. Sholty, 121 Ill. 660, 13 N. E. 239.

[36] Ralston v. The State Rights, Crabbe, 22, Fed. Cas. No. 11,540; Dibble v. Morris, 26 Conn. 416; Kilbourn v. Thompson, 1 McA. & M. 401; Sherman v. Dutch, 16 Ill. 283; Moore v. Crose, 43 Ind. 30; Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 3 S. W. 530; Webb v. Gilman, 80 Me. 177, 13 Atl. 688; Joice v. Branson, 73 Mo. 28; Sowers v. Sowers, 87 N. C. 303; Philadelphia Traction Co. v. Orbann, 119 Pa. St. 37, 12 Atl. 816; Pittsburgh, C. & St. L. Ry. Co. v. Lyon, 123 Pa. St. 140, 16 Atl. 607.

[37] Goetz v. Ambs, 27 Mo. 28; Green v. Craig, 47 Mo. 90; Borland v. Barrett, 76 Va. 128. See, also, cases cited in note 36, supra. Wantonness means reckless disregard of consequences. President, etc., of Baltimore & Y. T. R. Co. v. Boone, 45 Md. 344; Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 3 S. W. 530.

[38] Reeder v. Purdy, 48 Ill. 261; Cutler v. Smith, 57 Ill. 252; Smith v. Wunderlich, 70 Ill. 426; Drohn v. Brewer, 77 Ill. 280; Moore v. Crose, 43 Ind. 30; Jennings v. Maddox, 8 B. Mon. 430; Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 3 S. W. 530; Webb v. Gilman, 80 Me. 177, 13 Atl. 688; Raynor v. Nims, 37 Mich. 34; Joice v. Branson, 73 Mo. 28; Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342; Philadelphia Traction Co. v. Orbaun, 119 Pa. St. 37, 12 Atl. 816; Redfield v. Redfield, 75 Iowa, 435, 39 N. W. 688. Abuse of process is sufficient ground. Huckle v. Money, 2 Wils. 205; Nightingale v. Scannell, 18 Cal. 315; Louder v. Hinson, 4 Jones (N. C.) 369; Rodgers v. Ferguson, 36 Tex. 544; Shaw v. Brown, 41 Tex. 446. So also is willful refusal to perform official duty. Wilson v. Vaughn, 23 Fed. 229; Elbin v. Wilson, 33 Md. 135. A passenger rudely and wrongfully expelled from a train may recover exemplary damages, Philadelphia W. & B. R. Co. v. Larkin, 47 Md. 155; Knowles v. Railroad Co., 102 N. C. 59, 9 S. E. 7; but not where the conductor acted honestly, and there were no aggravating circumstances, Fitzgerald v. Railroad Co., 50 Iowa, 79; Philadelphia, W. & B. R. Co. v. Larkin, 47 Md. 155; Knowles v. Railroad Co., 77 Mo. 663; Hamilton v. Railroad Co., 53 N. Y. 25; Yates v. Railroad Co., 67 N. Y. 100; Tomlinson v. Railroad Co., 107 N. C. 327, 12 S. E. 138.

[39] Sedgw. Dam. § 367. See Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 3 S. W. 530. Contra, Singleton v. Kennedy, 9 B. Mon. 222, 226.

[40] Emblen v. Myers, 6 Hurl. & N. 54; U. S. v. Taylor, 35 Fed. 484; Mo

ages. Good faith [41] and provocation [42] may be shown in mitigation of damages. Evidence of defendant's wealth or poverty is admissible; [43] for what would be a heavy punishment for a poor man might be no punishment at all for a rich one, and vice versa.

bile & M. R. Co. v. Ashcraft, 48 Ala. 15; Lienkauf v. Morris, 66 Ala. 406; Citizens' St. Ry. Co. v. Steen, 42 Ark. 321; W. U. Tel. Co. v. Eyser, 2 Colo. 141; Linsley v. Bushnell, 15 Conn. 225; Kilbourn v. Thompson, 1 McA. & M. 401; Frink v. Coe, 4 Greene (Iowa) 555; Cochran v. Miller, 13 Iowa, 128; Bowler v. Lane, 3 Metc. (Ky.) 311; Fleet v. Hollenkemp, 13 B. Mon. 219; Kountz v. Brown, 16 B. Mon. 577; Wilkinson v. Drew, 75 Me. 360; Vicksburg & J. R. Co. v. Patton, 31 Miss. 156; Memphis & C. R. Co. v. Whitfield, 44 Miss. 466; Hopkins v. Railroad Co., 36 N. H. 9; Taylor v. Railway Co., 48 N. H. 304; Caldwell v. Steamboat Co., 47 N. Y. 282; Pittsburgh, C. & St. L. Ry. Co. v. Lyon, 123 Pa. St. 140, 16 Atl. 607; Byram v. McGuire, 3 Head, 530; Kolb v. Bankhead, 18 Tex. 228; Yerian v. Linkletter, 80 Cal. 135, 22 Pac. 70.

[41] Where defendant acted in good faith, he is not liable to exemplary damages. St. Peter's Church v. Beach, 26 Conn. 355; Oursler v. Railroad Co., 60 Md. 358; Millard v. Brown, 35 N. Y. 297; Bennett v. Smith, 23 Hun, 50; Tracy v. Swartwout, 10 Pet. 80; Plummer v. Harbut, 5 Iowa, 308; Pierce v. Getchell, 76 Me. 216; Pratt v. Pond, 42 Conn. 318; Nightingale v. Scannell, 18 Cal. 315; unless he acted in a cruel and abusive manner. Dalton v. Beers, 38 Conn. 529. See, also, Johnson v. Camp, 51 Ill. 219; Bauer v. Gottmanhausen, 65 Ill. 499; Jasper v. Purnell, 67 Ill. 358; Raynor v. Nims, 37 Mich. 34. Where defendant acted on advice of counsel, exemplary damages cannot be recovered. City Nat. Bank v. Jeffries, 73 Ala. 183; Cochrane v. Tuttle, 75 Ill. 361; Murphy v. Larson, 77 Ill. 172; Livingston v. Burroughs, 33 Mich. 511; Carpenter v. Barber, 44 Vt. 441; Shores v. Brooks, 81 Ga. 468, 8 S. E. 429. Defendant's honest belief that he was acting in the right will prevent or mitigate exemplary damages. Wilkinson v. Searcy, 76 Ala. 176; Farwell v. Warren, 70 Ill. 28; Allison v. Chandler, 11 Mich. 542; Brown v. Allen, 35 Iowa, 306.

[42] Ward v. Blackwood, 41 Ark. 295; Johnson v. Von Kettler, 66 Ill. 63; Shay v. Thompson, 59 Wis. 540, 18 N. W. 473; Currier v. Swan, 63 Me. 323; Kiff v. Youmans, 86 N. Y. 324, 331; Huftalin v. Misner, 70 Ill. 55.

[43] Brown v. Evans, 8 Sawy. 488, 17 Fed. 912; Grable v. Margrave, 4 Ill. 372; Jacobs' Adm'r v. Railroad Co., 10 Bush, 263; Sloan v. Edwards, 61 Md. 89; McCarthy v. Niskern, 22 Minn. 90; Peck v. Small, 35 Minn. 465, 29 N. W. 69; Whitfield v. Westbrook, 40 Miss. 311; Buckley v. Knapp, 48 Mo. 152; Belknap v. Railroad Co., 49 N. H. 358; Johnson v. Allen, 100 N. C. 131, 5 S. E. 666; Hayner v. Cowden, 27 Ohio St. 292; McBride v. McLaughlin, 5 Watts, 375; Dush v. Fitzhugh, 2 Lea, 307; Rea v. Harrington, 58 Vt. 181, 2 Atl. 475; Harman v. Cundiff, 82 Va. 239; Spear v. Sweeney,

Province of Court and Jury.

It is the province of the court to determine whether there is any evidence to support an award of exemplary damages.[44] It is the province of the jury to determine whether or not such damages should be awarded.[45] It is error to submit the question to the jury, in the absence of any evidence to sustain a verdict for exemplary damages,[46] and it is error to instruct the jury to give exemplary damages, for they rest solely in the discretion of the jury, and cannot be claimed as a matter of law.[47] The amount of exemplary

88 Wis. 545, 60 N. W. 1060; Birchard v. Booth, 4 Wis. 67; Meibus v. Dodge, 38 Wis. 300; Winn v. Peckham, 42 Wis. 493; Brown v. Swineford, 44 Wis. 282; Lavery v. Crooke, 52 Wis. 612, 9 N. W. 599; Hare v. Marsh, 61 Wis. 435, 21 N. W. 267; Spear v. Hiles, 67 Wis. 350, 30 N. W. 511. But contra, Guengerech v. Smith, 34 Iowa, 348. Defendant may show his poverty in rebuttal, Mullin v. Spangenberg, 112 Ill. 140; Rea v. Harrington, 58 Vt. 181, 2 Atl. 475; or in chief, Johnson v. Smith, 64 Me. 553. It has been held that evidence of the pecuniary condition of plaintiff is admissible, Beck v. Dowell, 111 Mo. 506, 20 S. W. 209 (action for personal injuries); Gaither v. Blowers, 11 Md. 536; McNamara v. King, 7 Ill. 432 (assault and battery); Grable v. Margrave, 4 Ill. 372 (seduction); Hayner v. Cowden, 27 Ohio St. 292.

[44] Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456; City of Chicago v. Martin, 49 Ill. 241; Heil v. Glanding, 42 Pa. St. 493; Kennedy v. Railroad Co., 36 Mo. 351.

[45] Pratt v. Pond, 42 Conn. 318; Dye v. Denham, 54 Ga. 224; Johnson v. Smith, 64 Me. 553; Smith v. Thompson, 55 Md. 5; Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456; Graham v. Railroad Co., 66 Mo. 536; Nagle v. Mullison, 34 Pa. St. 48; Hawk v. Ridgway, 33 Ill. 473. Punitive damages for slander are not allowed as a matter of right, but their recovery rests in the sound discretion of the jury. Nicholson v. Rogers, 129 Mo. 136, 31 S. W. 260.

[46] Selden v. Cashman, 20 Cal. 56; Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456; Rose v. Story, 1 Pa. St. 190; Amer v. Longstreth, 10 Pa. St. 115; Pittsburgh Southern Ry. Co. v. Taylor, 104 Pa. St. 306; Philadelphia Traction Co. v. Orbann, 119 Pa. St. 37, 12 Atl. 816; Bradshaw v. Buchanan, 50 Tex. 492.

[47] Hawk v. Ridgway, 33 Ill. 473; Wabash, St. L. & P. Ry. Co. v. Rector, 104 Ill. 296; Louisville & N. R. Co. v. Brooks' Adm'x, 83 Ky. 129; Southern R. Co. v. Kendrick, 40 Miss. 374; New Orleans, St. L. & C. R. Co. v. Burke, 53 Miss. 200; Jerome v. Smith, 48 Vt. 230; Boardman v. Goldsmith, Id. 403; Snow v. Carpenter, 49 Vt. 426; Webb v. Gilman, 80 Me. 177, 13 Atl. 688; Jacobs v. Sire, 4 Misc. Rep. 398, 23 N. Y. Supp. 1063. Contra, Mayer v. Duke, 72 Tex. 445, 10 S. W. 565; Fox v. Wunderlich, 64 Iowa, 187, 20 N.

damages is limited only by the sound discretion of the jury,[48] but where the verdict is so excessive as to show passion, prejudice, or corruption, the court may set it aside.[49]

In What Actions Recoverable.

As a general rule, exemplary damages can be recovered only in actions of tort.[50] Actions for breach of promise of marriage, however, constitute an exception to the rule;[51] and it has been held that exemplary damages can be recovered in an action on a statutory bond, where its condition was broken by a tort such as would ordinarily justify the infliction of exemplary damages.[52] In suits in equity, exemplary damages are never given.[53] Where the circumstances justify it, exemplary damages may be recovered in actions

W. 7; Thill v. Pohlman, 76 Iowa, 638, 41 N. W. 385; Hodgson v. Millward, 3 Grant, Cas. 406; Platt v. Brown, 30 Conn. 336; Coryell v. Colbaugh, 1 N. J. Law, 77.

[48] Graham v. Railroad Co., 66 Mo. 536; New Orleans, St. L. & C. R. Co. v. Burke, 53 Miss. 200; Southern R. Co. v. Kendrick, 40 Miss. 374; Johnson v. Smith, 64 Me. 553; Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456; Borland v. Barrett, 76 Va. 128; Canfield v. Chicago, R. I. & P. Ry. Co., 59 Mo. App. 354. In New Orleans, J. & G. N. R. Co. v. Hurst, 36 Miss. 660, the court refused to set aside a verdict of $4,500 against a railroad company for carrying a passenger 400 yards beyond his station, and refusing to return. The court said there was "no legal measurement, save their discretion."

[49] Flannery v. Railroad Co., 4 Mackey, 111; Cutler v. Smith, 57 Ill. 252; Farwell v. Warren, 70 Ill. 28; Collins v. Council Bluffs, 35 Iowa, 432; Goetz v. Ambs, 27 Mo. 28; Borland v. Barrett, 76 Va. 128; Rogers v. Henry, 32 Wis. 327.

[50] Sedg. Dam. § 370. Exemplary damages cannot be recovered in actions of contract. Guildford v. Anglo-French Steamship Co., 9 Can. Sup. Ct. 303.

[51] McPherson v. Ryan, 59 Mich. 33, 26 N. W. 321; Johnson v. Jenkins, 24 N. Y. 252; Thorn v. Knapp, 42 N. Y. 474; Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308.

[52] Floyd v. Hamilton, 33 Ala. 235; Richmond v. Shickler, 57 Iowa, 486, 10 N. W. 882; Renkert v. Elliott, 11 Lea, 235. Contra, Cobb v. People, 84 Ill. 511; McClendon v. Wells, 20 S. C. 514. Exemplary damages are not recoverable against the sureties on a bond for a distress warrant. Hamilton v. Kilpatrick (Tex. Civ. App.) 29 S. W. 819. Sureties on sequestration or replevin bonds are not liable for exemplary damages on account of the malice of the principal. McArthur v. Barnes (Tex. Civ. App.) 31 S. W. 212. And see North v. Johnson, 58 Minn. 242, 59 N. W. 1012.

[53] All claims to exemplary damages are waived by coming into equity. Bird v. Railroad Co., 8 Rich. Eq. 46.

for assault and battery,[54] false imprisonment,[55] malicious prosecution,[56] defamation,[57] willful injuries to person[58] or property,[59]

[54] Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668; Smith v. Bagwell, 19 Fla. 117; McNamara v. King, 7 Ill. 432; Reeder v. Purdy, 48 Ill. 261; Drohn v. Brewer, 77 Ill. 280; Harrison v. Ely, 120 Ill. 83, 11 N. E. 334; Root v. Sturdivant, 70 Iowa, 55, 29 N. W. 802; Titus v. Corkins, 21 Kan. 722; Slater v. Sherman, 5 Bush, 206; Pike v. Dilling, 48 Me. 539; Webb v. Gilman, 80 Me. 177, 13 Atl. 688; President, etc., of Baltimore & Y. Turnpike Road v. Boone, 45 Md. 344; Elliott v. Van Buren, 33 Mich. 49; Crosby v. Humphreys, 59 Minn. 92, 60 N. W. 843; Green v. Craig, 47 Mo. 90; Canfield v. Chicago, R. I. & P. R. Co., 59 Mo. App. 354; Cook v. Ellis, 6 Hill, 466; Louder v. Hinson, 4 Jones (N. C.) 369; Porter v. Seiler, 23 Pa. St. 424; Newell v. Whitcher, 53 Vt. 589; Borland v. Barrett, 76 Va. 128; Shay v. Thompson, 59 Wis. 540, 18 N. W. 473.

[55] Huckle v. Money, 2 Wils. 205; Bradley v. Morris, Busb. 395; McCarthy v. De Armit, 99 Pa. St. 63; Grohmann v. Kirschman, 168 Pa. St. 189, 32 Atl. 32; Clissold v. Machell, 26 U. C. Q. B. 422.

[56] Donnell v. Jones, 13 Ala. 490; Coleman v. Allen, 79 Ga. 637, 5 S. E. 204; Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. 864; McWilliams v. Hoban, 42 Md. 56; Peck v. Small, 35 Minn. 465, 29 N. W. 69; Winn v. Peckham, 42 Wis. 493; Spear v. Hiles, 67 Wis. 350, 30 N. W. 506; Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101.

[57] Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202; Binford v. Young, 115 Ind. 174, 16 N. E. 142; Daly v. Van Benthuysen, 3 La. Ann. 69; Buckley v. Knapp, 48 Mo. 152; Nicholson v. Rogers, 129 Mo. 136, 31 S. W. 260; King v. Root, 4 Wend. 113; Sowers v. Sowers, 87 N. C. 303; Press Pub. Co. v. McDonald, 11 C. C. A. 155, 63 Fed. 238; Barr v. Moore, 87 Pa. St. 385; Rea v. Harrington, 58 Vt. 181, 2 Atl. 475; Harman v. Cundiff, 82 Va. 239; Haines v. Schultz, 50 N. J. Law, 481, 14 Atl. 488 (newspaper libel); Klewin v. Bauman, 53 Wis. 244, 10 N. W. 398. Express malice must be shown. Republican Pub. Co. v. Conroy, 5 Colo. App. 262, 38 Pac. 423; Childers v. Publishing Co., 105 Cal. 284, 38 Pac. 903. Cf. Smith v. Matthews, 9 Misc. Rep. 427, 29 N. Y. Supp. 1058. The falsity of the defamation is evidence of malice. Bergmann v. Jones, 94 N. Y. 51. But exemplary damages may be recovered, in the absence of express malice, if the defamation was wanton. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342. The bad character of plaintiff is admissible in mitigation of exemplary damages. Maxwell v. Kennedy, 50 Wis. 645, 7 N. W. 657.

[58] Dalton v. Beers, 38 Conn. 529; Georgia R. R. v. Olds, 77 Ga. 673; Jeffersonville R. Co. v. Rogers, 38 Ind. 116; Philadelphia, W. & B. R. Co. v. Larkin, 47 Md. 155; Knowles v. Railroad Co., 102 N. C. 59, 9 S. E. 7; Higgins v. Railroad Co., 64 Miss. 80, 8 South. 176; Dorrah v. Railroad Co., 65 Miss. 14, 3 South. 36; Louisville & N. R. Co. v. Greer (Ky.) 29 S. W. 337.

[59] U. S. v. Taylor, 35 Fed. 484; Devaughn v. Heath, 37 Ala. 595; Bales v.

and in actions of trover[60] and replevin.[61] In actions founded on loss of service, as for enticement,[62] seduction,[63] criminal conversation,[64] and for harboring plaintiff's wife,[65] exemplary damages may be recovered.[66]

Exemplary Damages for Torts Which are Also Crimes.

In actions of tort, where the tort is also a crime, it is held, in some jurisdictions, that exemplary damages cannot be recovered; for the defendant would be thereby subjected to double punishment

Clark, 15 Ark. 452; Curtiss v. Hoyt, 19 Conn. 154; Shores v. Brooks, 81 Ga. 468, 8 S. E. 429; Cutler v. Smith, 57 Ill. 252; Chicago & I. R. Co. v. Baker, 73 Ill. 316; Keirnan v. Heaton, 69 Iowa, 136, 28 N. W. 478; Briggs v. Milburn, 40 Mich. 512; Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Parker v. Shackelford, 61 Mo. 68; Perkins v. Towle, 43 N. H. 220; Winter v. Peterson, 24 N. J. Law, 524; Allaback v. Utt, 51 N. Y. 651; Greenville & C. R. Co. v. Partlow, 14 Rich. (S. C.) 237; Cox v. Crumley, 5 Lea (Tenn.) 529; Cook v. Garza, 9 Tex. 358; Camp v. Camp, 59 Vt. 667, 10 Atl. 748; Koenigs v. Jung, 73 Wis. 178, 40 N. W. 801; Cumberland Tel. & Tel. Co. v. Poston, 94 Tenn. 696, 30 S. W. 1040 (wanton destruction of ornamental trees).

[60] Dennis v. Barber, 6 Serg. & R. 420; Harger v. McMains, 4 Watts, 418; Taylor v. Morgan, 3 Watts, 333; Silver v. Kent, 60 Miss. 124. Contra, Berry v. Vantries, 12 Serg. & R. 89.

[61] Cable v. Dakin, 20 Wend. 172; McDonald v. Scaife, 11 Pa. St. 381; Brizee v. Maybee, 21 Wend. 144; Holt v. Van Eps, 1 Duk. 206, 46 N. W. 689; Whitfield v. Whitfield, 40 Miss. 352; McCabe v. Morehead, 1 Watts & S. 513; Schofield v. Ferrers, 46 Pa. St. 438; Single v. Schneider, 30 Wis. 570. Contra, Butler v. Mehrling, 15 Ill. 488; Hotchkiss v. Jones, 4 Md. 260. It would seem that the rule should be the same in actions of detinue. Whitfield v. Whitfield, 40 Miss. 352. Contra, McDonald v. Norton, 72 Iowa, 652, 34 N. W. 458.

[62] Smith v. Goodman, 75 Ga. 198; Tyson v. Ewing, 3 J. J. Marsh. 185; Bixby v. Dunlap, 56 N. H. 456; Magee v. Holland, 27 N. J. Law, 86.

[63] Robinson v. Burton, 5 Har. (Del.) 335; Grable v. Margrave, 4 Ill. 372; Stevenson v. Belknap, 6 Iowa, 97; Fox v. Stevens, 13 Minn. 272 (Gil. 252); Lavery v. Crooke, 52 Wis. 612, 9 N. W. 599.

[64] Johnson v. Disbrow, 47 Mich. 59, 10 N. W. 79; Matheis v. Mazet, 164 Pa. St. 580, 30 Atl. 434. See Williams v. Williams, 20 Colo. 51, 37 Pac. 614 (action by wife for enticing away husband).

[65] Johnson v. Allen, 100 N. C. 131, 5 S. E. 666.

[66] In case of physical injury to a child or servant, exemplary damages can be recovered only in an action by the child or servant. They cannot be recovered in an action by the master or parent for loss of services. Black v. Railroad Co., 10 La. Ann. 33; Hyatt v. Adams, 16 Mich. 180; Whitney v. Hitchcock, 4 Denio, 461. Contra, Klingman v. Holmes, 51 Mo. 304.

for the same offense.[67] In other jurisdictions, this is considered no objection to the allowance of exemplary damages, and it is not even admissible in mitigation.[68] "Judgment for the criminal offense is for the offense against the public. Judgment for the tort is for the offense against the private sufferer. * * * Though punitory damages go in the right of the public, for example, they do not go by way of public punishment, but by way of private damages,—for the act as a tort and not as a crime,—to the private sufferer and not to the state. Though they are allowed beyond compensation of the private sufferer, they still go to him, for himself, as damages allowed to him by law, in addition to his actual damages, like the double and treble damages sometimes allowed by statute. Considered as strictly punitory, the damages are for the punishment of the private tort, not of the public crime." [69] This reasoning is not very satisfactory. As has been well said,[70] after there has been one trial, in which defendant's culpability has been tried with a view to punishment in the interest of the public, any other trial for the same purpose, whatever may be the form of the proceeding, is, in substance, putting the accused again in jeopardy of punishment for the same offense, and vexing him again for the same cause. In some

[67] Murphy v. Hobbs, 7 Colo. 541, 5 Pac. 119; Huber v. Teuber, 3 McArthur, 484; Cherry v. McCall, 23 Ga. 193; Taber v. Hutson, 5 Ind. 322; Butler v. Mercer, 14 Ind. 479; Nossaman v. Rickert, 18 Ind. 350; Humphries v. Johnson, 20 Ind. 190; Meyer v. Bohlfing, 44 Ind. 238; Ziegler v. Powell, 54 Ind. 173; Stewart v. Maddox, 63 Ind. 51; Farman v. Lauman, 73 Ind. 568; Austin v. Wilson, 4 Cush. 273; Fay v. Parker, 53 N. H. 342.

[68] Brown v. Evans, 8 Sawy. 488, 17 Fed. 912; Phillips v. Kelly, 29 Ala. 628; Wilson v. Middleton, 2 Cal. 54; Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668; Jefferson v. Adams, 4 Har. 321; Smith v. Bagwell, 19 Fla. 117; Hendrickson v. Kingsbury, 21 Iowa, 379; Garland v. Wholeham, 26 Iowa, 185; Guengerich v. Smith, 36 Iowa, 587; Redden v. Gates, 52 Iowa, 210, 2 N. W. 1079; Chiles v. Drake, 2 Metc. (Ky.) 146; Elliott v. Van Buren, 33 Mich. 49; Boetcher v. Staples, 27 Minn. 308, 7 N. W. 263; Wheatley v. Thorn, 23 Miss. 62; Corwin v. Walton, 18 Mo. 71; Cook v. Ellis, 6 Hill, 466; Sowers v. Sowers, 87 N. C. 303; Roberts v. Mason, 10 Ohio St. 277; Barr v. Moore, 87 Pa. St. 385; Wolff v. Cohen, 8 Rich. 144; Cole v. Tucker, 6 Tex. 266; Edwards v. Leavitt, 46 Vt. 126; Klopfer v. Bromme, 26 Wis. 372; Brown v. Swineford, 44 Wis. 282; Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468.

[69] Brown v. Swineford, 44 Wis. 285. See, also, Fry v. Bennett, 4 Duer, 247.

[70] Suth. Dam. § 402.

jurisdictions, the verdict and judgment in the first trial are admissible in mitigation on the second.[71]

LIABILITY OF PRINCIPAL FOR ACT OF AGENT.

87. A principal is not liable to exemplary damages for the tort of his agent or servant, unless he authorized or ratified the act as it was performed, or was himself guilty of negligence.

EXCEPTION—In some jurisdictions, if the principal is liable for compensatory damages, he is liable also for exemplary damages, if the agent or servant would be.

Exemplary damages, being designed as a punishment, cannot justly be inflicted in the absence of fault, and therefore cannot be recovered in an action against a principal for the act of his agent or servant,[72] unless he authorized or ratified the act as it was performed,[73] or was himself guilty of negligence in employing the agent,[74] or in not preventing the act.[75] "For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he

71 Taylor v. Carpenter, 2 Woodb. & M. 1, 23, Fed. Cas. No. 13,785; State v. Autery, 1 Stew. (Ala.) 399; Johnston v. Crawford, 62 N. C. 342; Porter v. Seiler, 23 Pa. St. 424; Smithwick v. Ward, 7 Jones (N. C.) 64; Sowers v. Sowers, 87 N. C. 303; Flanagan v. Womack, 54 Tex. 45; Shook v. Peters, 59 Tex. 393.

72 The Amiable Nancy, 3 Wheat. 546; Pollock v. Gantt, 69 Ala. 373; Burns v. Campbell, 71 Ala. 271; Wardrobe v. Stage Co., 7 Cal. 118; Mendelsohn v. Anaheim Lighter Co., 40 Cal. 657; Grund v. Van Vleck, 69 Ill. 478; Keene v. Lizardi, 8 La. 26; Boulard v. Calhoun, 13 La. Ann. 445; Texas T. R. Co. v. Johnson, 75 Tex. 158, 12 S. W. 482.

73 Lienkauf v. Morris, 66 Ala. 406; Becker v. Dupree, 75 Ill. 167; Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760; Kilpatrick v. Haley, 66 Fed. 133, 13 C. C. A. 480.

74 Burns v. Campbell, 71 Ala. 271; Sawyer v. Sauer, 10 Kan. 466.

75 Freese v. Tripp, 70 Ill. 496; Kehrig v. Peters, 41 Mich. 475, 2 N. W. 801.

is chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant knowing that he was incompetent, or from bad habits unfit for the position he occupied."[76] It is, however, sometimes held that, if the principal is bound to make compensation for the act of his servant or agent, he is also liable to exemplary damages if the servant or agent would be.[77] In those jurisdictions where exemplary damages are in fact compensatory, the master is liable for such damages, if liable at all.

Liability of Corporations.

It is usually held that corporations are liable to exemplary damages for the acts of their agents or servants, in cases where the agent or servant would be liable to such damages.[78] This is placed on

[76] Cleghorn v. Railroad Co., 56 N. Y. 44. See, also, Sullivan v. Navigation Co., 12 Or. 392, 1 Pac. 508; Mace v. Reed, 89 Wis. 440, 62 N. W. 186. Cf. Memphis & C. Packet Co. v. Nagel (Ky.) 29 S. W. 743.

[77] Hazard v. Israel, 1 Bin. 240; Southern Exp. Co. v. Brown, 67 Miss. 260, 7 South. 318, and 8 South. 425. Exemplary damages may be recovered against a firm for the act of one partner in the course of the partnership business. Robinson v. Goings, 63 Miss. 500.

[78] Citizens' St. Ry. Co. v. Steen, 42 Ark. 321; W. U. Tel. Co. v. Eyser, 2 Colo. 141; Flannery v. Railroad Co., 4 Mackey, 111; Illinois Cent. R. Co. v. Hammer, 72 Ill. 353; Singer Manuf'g Co. v. Holdfodt, 86 Ill. 455; Wabash, St. L. & P. Ry. Co. v. Rector, 104 Ill. 296; Wheeler & Wilson Manuf'g Co. v. Boyce, 36 Kan. 350, 13 Pac. 609; Southern Kansas R. Co. v. Rice, 38 Kan. 398, 16 Pac. 817; Bowler v. Lane, 3 Metc. (Ky.) 311; Jacobs v. Railroad Co., 10 Bush, 263; Central Pass. R. Co. v. Chatterson (Ky.) 29 S. W. 18; Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 3 S. W. 530; Goddard v. Railway Co., 57 Me. 202; Hanson v. Railroad Co., 62 Me. 84; Baltimore & O. R. Co. v. Blocher, 27 Md. 277; President, etc., of Baltimore & Y. T. R. v. Boone, 45 Md. 344; Baltimore & O. R. Co. v. Barger, 80 Md. 23, 30 Atl. 560; Philadelphia, W. & B. R. Co. v. Larkin, 47 Md. 155; Vicksburg & J. R. Co. v. Patton, 31 Miss. 156; Perkins v. Railroad Co., 55 Mo. 201; Travers v. Railway Co., 63 Mo. 421; Canfield v. Railroad Co., 59 Mo. App. 354; Belknap v. Railroad Co., 49 N. H. 358; Atlantic & G. W. Ry. Co. v. Dunn, 19 Ohio St. 162; Lake Shore & M. S. Ry. Co. v. Rosenzweig, 113 Pa. St. 519, 6 Atl. 545; Philadelphia Traction Co. v. Orbann, 119 Pa. St. 37, 12 Atl. 816; Quinn v. Railway Co., 29 S. C. 381, 7 S. E. 614; Louisville & N. R. Co. v. Garrett, 8 Lea, 438. A railroad company has been held liable for exemplary damages for the act of a corporation operating its road as a lessee, see Hart v. Railroad Co., 33 S. C.

the ground that otherwise corporations would never be liable for exemplary damages, since they can act only by agents or servants. Thus it has been said:[79] "We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied then to railroad corporations in their capacity of carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases when such act is directly or impliedly ratified; for no such cases will occur. A corporation is an imaginary being. It has no mind but the mind of its servants. It has no voice but the voice of its servants. It has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as schemes of public enterprise, are conceived by human minds and executed by human hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation, or the malice of the servant and the malice of the corporation, or the punishment of the servant and the punishment of the corporation, are sheer nonsense, and only tend to confuse the mind and confound the judgment." In many jurisdictions, however, the same rule is applied to corporations as is applied to individuals, and the corporation is not liable unless it authorized or ratified the act.[80] Obviously, a corporation can authorize or ratify an act of

427, 12 S. E. 9; and for act of conductor in ejecting passenger, Southern Kansas R. Co. v. Rice, 38 Kan. 398, 16 Pac. 817; Goddard v. Railroad Co., 57 Me. 202; Lucas v. Railroad Co., 98 Mich. 1, 56 N. W. 1039; Louisville, N. A. & C. R. Co. v. Wolfe, 128 Ind. 347, 27 N. E. 606. Cf. Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261.

[79] Goddard v. Railway Co., 57 Me. 202, 223. See, also, Hanson v. Railway Co., 62 Me. 84.

[80] City Nat. Bank v. Jeffries, 73 Ala. 183; Turner v. Railroad Co., 34 Cal. 594; Mendelsohn v. Lighter Co., 40 Cal. 657; McCoy v. Railroad Co., 5 Houst. 599; Hill v. Railroad Co., 11 La. Ann. 292; Great Western Ry. Co. v. Miller, 19 Mich. 305; Ackerson v. Railway Co., 32 N. J. Law, 254; Murphy v. Railroad Co., 48 N. Y. Super. Ct. 96; Sullivan v. Navigation Co., 12 Or. 392; Kell v. Gas Co., 131 Pa. St. 466, 19 Atl. 78. Cf. Lake Shore & M. S. Ry. Co. v. Rosenzweig, 113 Pa. St. 519, 6 Atl. 515; Philadelphia Traction Co. v. Orbann, 119 Pa. St. 37, 12 Atl. 816; Hagan v. Railroad Co., 3 R. I. 88; Hays v. Railroad Co., 46 Tex. 272; Galveston, H. & S. A. Ry. Co. v. Donahoe, 56 Tex. 162;

an agent only by the act of another agent. A distinction must be drawn between directors and other agents, whose acts are the acts of the corporation, and mere servants.

International & G. N. R. Co. v. Garcia, 70 Tex. 207, 7 S. W. 802; Ricketts v. Railway Co., 33 W. Va. 433, 10 S. E. 801; Milwaukee & M. R. Co. v. Finney, 10 Wis. 388; Bass v. Railway Co., 36 Wis. 450, 39 Wis. 636; Craker v. Railway Co., 36 Wis. 657; Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760; Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261; The Normannia, 62 Fed. 469; Beers v. Packet Co., Id. Where a railroad company ratifies the malicious act of its conductor in removing a passenger from a train with unnecessary force, it is liable for exemplary damages. International & G. N. Ry. Co. v. Miller (Tex. Civ. App.) 28 S. W. 233.

CHAPTER VIII.

PLEADING AND PRACTICE.

88. Allegation of Damage—The Ad Damnum.
89-91. Form of Statement.
92-93. Province of Court and Jury.

ALLEGATION OF DAMAGE—THE AD DAMNUM.

88. When the object of an action is to recover damages, the declaration should allege that the injury is to the damage of the plaintiff, and the amount of the damage should be stated. The recovery cannot, in general, exceed the amount specified, though it may be less.

The declaration in an action at law consists of a statement of the facts upon which plaintiff bases his right to relief. When the action is to recover damages, the declaration should allege that the facts resulted in damage to the plaintiff. The amount should be stated, and should be fixed sufficiently high to cover the real demand, as the plaintiff cannot, in general, recover a greater amount than he has alleged.[1] But the jury may find a less amount than

[1] Annis v. Upton, 66 Barb. 370; McIntire v. Clark, 7 Wend. 330; Lake v. Merrill, 10 N. J. Law, 288; Herbert v. Hardenbergh, Id. 222; Hawk v. Anderson, 9 N. J. Law, 319; Stafford v. City of Oskaloosa, 57 Iowa, 748, 11 N. W. 668; Davenport v. Bradley, 4 Conn. 309; Henderson v. Stainton, Hardin, 125; Robinett v. Morris' Adm'rs, Id. 93; Tyner v. Hays, 37 Ark. 599; White v. Cannada, 25 Ark. 41; Snow v. Grace, Id. 570; Derrick v. Jones, 1 Stew. (Ala.) 18; Hall v. Hall, 42 Ind. 585; McWhorter v. Sayre, 2 Stew. (Ala.) 225; Rowan v. Lee, 3 J. J. Marsh. 97; Edwards v. Wiester, 2 A. K. Marsh. 382; Cheveley v. Morris, 2 W. Bl. 1300; Curtiss v. Lawrence, 17 Johns. 111; Fish v. Dodge, 4 Denio, 311; Pierson v. Finney, 37 Ill. 29; Kelley v. Bank, 64 Ill. 541; Lantz v. Frey, 19 Pa. St. 366; David v. Conard, 1 Greene (Iowa) 336; Cameron v. Boyle, 2 Greene (Iowa) 154. But see Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 3 N. E. 456, where it was held error to instruct the jury not to give damages above the ad damnum. The error in rendering a verdict in excess of the ad damnum may be cured by plaintiff remitting the excess, or the ad damnum may be amended. Harris v. Jaffray, 3 Har. & J. 543; Cahill v.

that alleged. The mere fact that a plaintiff claims more than the facts alleged entitle him to will not render the declaration demurrable,[2] but he cannot recover more than the facts will warrant.[3] After verdict, it will be presumed that the damages were assessed according to the proof.[4]

The portion of the declaration alleging and claiming damages is call the "ad damnum." It is usually considered as a legal conclusion from the facts stated. Where this is true, it cannot be traversed, and is not admitted by a failure to answer or deny it.[5] It is a matter of form, not of substance.[6] If it is omitted, or left blank, the judgment is not for that reason void.[7] In some jurisdictions the allegation of the amount of damages is considered an allegation of fact, and traversable.[8] In code states a declaration will not sup-

Pintony, 4 Munf. 371; Schneider v. Seeley, 40 Ill. 257; Pickering v. Pulsifer, 9 Ill. 79; Grass Val. Quartz Min. Co. v. Stackhouse, 6 Cal. 413; Lantz v. Frey, 19 Pa. St. 366. See Corning v. Corning, 6 N. Y. 97; Tyner v. Hays, 37 Ark. 599; Miller v. Weeks, 22 Pa. St. 890; McClannahan v. Smith, 76 Mo. 428; Johnson v. Brown, 57 Barb. 118; Deane v. O'Brien, 13 Abb. Prac. 11; Dressler v. Davis, 12 Wis. 58; Moore v. Tracy, 7 Wend. 229; Palmer v. Wylie, 19 Johns. 276; Jackson v. Covert's Adm'rs, 5 Wend. 139; Crabb's Ex'rs v. Bank, 6 Yerg. 332. Where double damages are claimed, the ad damnum limits the actual damage. Rosevelt v. Hanold, 65 Mich. 414, 32 N. W. 443.

[2] Leland v. Tousey, 6 Hill, 328; W. U. Tel. Co. v. Hopkins, 49 Ind. 223.

[3] Murphy v. Evans, 11 Ind. 517; Wainwright v. Weske, 82 Cal. 196, 23 Pac. 12.

[4] Van Rensselaer's Ex'rs v. Platner's Ex'rs, 2 Johns. Cas. 17.

[5] Jenkins v. Steanka, 19 Wis. 126; Bartelt v. Braunsdorf, 57 Wis. 1, 14 N. W. 869; Raymond v. Traffarn, 12 Abb. Prac. 52; Woodruff v. Cook, 25 Barb. 505; McKensie v. Farrell, 4 Bosw. 192; Thompson v. Lumley, 7 Daly, 74; Newman v. Otto, 4 Sandf. 668; McLees v. Felt, 11 Ind. 218.

[6] Connoss v. Meir, 2 E. D. Smith, 314

[7] Galena & C. U. R. Co. v. Appleby, 28 Ill. 283; Mattingly v. Darwin, 23 Ill. 618; Hargrave v. Penrod, 1 Ill. 401; Bank of Metropolis v. Guttschlick, 14 Pet. 19; Stephens v. White, 2 Wash. (Va.) 260. See, also, Kennedy v. Woods, 3 Bibb, 322; Digges v. Norris, 3 Hen. & M. 268; Palmer v. Mill, Id. 502.

[8] Brownson v. Wallace, 4 Blatchf. 465, Fed. Cas. No. 2,042; Tucker v. Parks, 7 Colo. 62, 1 Pac. 427; Carlyon v. Lannan, 4 Nev. 156; Cole v. Hoeburg, 36 Kan. 263, 13 Pac. 275; White v. Stage Co., 5 Or. 99. Failure to deny the amount claimed admits that that is the correct amount due. Huston v. Railroad Co., 45 Cal. 550; Dimick v. Campbell, 31 Cal. 238; Patterson v. Ely, 19 Cal. 28.

port a judgment by default unless it contains an allegation of damages.[9]

SAME—FORM OF STATEMENT.

89. With respect to questions of pleading, damages are divided into two classes:

(a) General, and

(b) Special.

90. General damages are such as necessarily result from the wrong complained of. They are therefore presumed by law, and need not be specifically alleged.

91. Special damages are such as are not the necessary consequence of the wrong complained of, but which actually occur as a proximate result thereof. They are not presumed by law, and must be pleaded specially and circumstantially, or compensation therefor cannot be recovered.

Mr. Chitty says: "Damages are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place, and are not implied by law, and are either superadded to general damages arising from an act injurious in itself,—as when some particular damage arises from the uttering of slanderous words actionable in themselves,—or are such as arise from an act indifferent, and not actionable in itself, but only injurious in its consequences." [10] Again: "It does not appear necessary to state the former description of the damages in the declaration, because presumptions of law are not, in general, to be pleaded or averred as facts. * * * But, when the law does not necessarily imply that

[9] Simonson v. Blake, 12 Abb. Prac. 331; Walton v. Walton, 32 Barb. 203; Pittsburgh Coal Min. Co. v. Greenwood, 39 Cal. 71; Gautier v. English, 29 Cal. 165; Parrott v. Den, 34 Cal. 79. In some states, by statute, in actions of contract, damages need not be proved. Cole v. Hoeburg, 36 Kan. 263, 13 Pac. 275; White v. Stage Co., 5 Or. 99. See, also, Bartlett v. Bank, 79 Cal. 218, 21 Pac. 743.

[10] Chit. Pl. 410.

the plaintiff sustained the damages by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity. * * * And whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent surprise on the defendant, which might otherwise ensue at the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it. Thus, in an action of trespass and false imprisonment, where the plaintiff offered to give in evidence that during the imprisonment he was stinted in his allowance of food, he was not permitted to do so, because the fact was not, as it should have been, stated in the declaration; and in a similar action it was held that the plaintiff could not give evidence of his health being injured, unless specially stated. So, in trespass 'for taking a horse,' nothing can be given in evidence which is not expressed in the declaration; and, if money was paid over in order to regain possession, such payment should be alleged as special damages." [11] These rules are equally applicable to pleadings under the code or common-law systems.

It has been seen that nominal damages can be recovered only in cases where the law will presume damage.[12] Such damages are necessarily general. They could not be specially pleaded. All that is necessary is that the declaration shall state facts constituting a cause of action.[13]

Compensatory damages, strictly so called, may be either general or special. In either case the plaintiff must prove the amount. If they are general, the law may presume that some such damage resulted, but it cannot presume anything as to its amount. The plaintiff must therefore show the amount by evidence, or only nominal damages can be recovered.[14] Where compensation is sought

[11] Id. 411.

[12] See ante, p. 24.

[13] Cowley v. Davidson, 10 Minn. 392 (Gil. 314); Hood v. Palm, 8 Pa. St. 237; Parker v. Griswold, 17 Conn. 288.

[14] See ante, pp. 25, 70; Suth. Dam. § 9; Sedg. Dam. § 97; Freese v. Crary, 29 Ind. 524; Carl v. Coal Co., 69 Iowa, 519, 29 N. W. 437; Thorp v. Bradley, 75 Iowa, 55, 39 N. W. 177; Bruce v. Pettengill, 12 N. H. 341.

for special damage, its amount must be proved, at least approximately, or nothing can be recovered.

Exemplary damages need not be specially pleaded.[15] The rules of pleading do not require that the circumstances which attend the tort shall be specially averred, in order to entitle the plaintiff to damages commensurate with them. They are matters of evidence, and should not be pleaded. If outrage and oppression attend a tort, they belong to the wrongful act itself, and are not merely special injury.[16] "In trespass you may charge and prove the whole circumstances accompanying the act, and which were part of the res gestæ, in order to show the temper and purposes with which the trespass was committed."[17] It has been held that, where exemplary damages are claimed on the ground of malice, malice must be pleaded.[18]

Illustrations.

Bodily and mental suffering are the necessary consequence of a personal injury. They are therefore general, and not special items of damage, and may be proved without being pleaded.[19] In an action for personal injuries, under an allegation that plaintiff was thereby prevented from attending to his ordinary business, he cannot

[15] Gustafson v. Wind, 62 Iowa, 281, 17 N. W. 523; Andrews v. Stone, 10 Minn. 72 (Gil. 52); Wilkinson v. Drew, 75 Me. 360; Southern Exp. Co. v. Brown, 67 Miss. 260, 7 South. 318, and 8 South. 425; Savannah, F. & W. Ry. Co. v. Holland, 82 Ga. 257, 10 S. E. 200; Alabama G. S. R. Co. v. Arnold, 84 Ala. 159, 4 South. 359. Contra, International & G. N. R. Co. v. Smith, 62 Tex. 252; Galveston, H. & S. A. R. Co. v. Le Gierse, 51 Tex. 189.

[16] Per Strong, J., in Schofield v. Ferrers, 46 Pa. St. 438. Under some Codes, the facts justifying the allowance of exemplary damages must be pleaded. Welsh v. Stewart, 31 Mo. App. 376; Sullivan v. Navigation Co., 12 Or. 392, 7 Pac. 508.

[17] Ogden v. Gibbons, 5 N. J. Law, 518.

[18] Johnson v. Railroad Co., 51 Iowa, 25, 50 N. W. 543; Jones v. Marshall, 56 Iowa, 739, 10 N. W. 264. In an action for malicious prosecution, exemplary damages may be recovered without being specially pleaded, as such damages arise from the existence of malice. Davis v. Seeley (Iowa) 60 N. W. 183.

[19] Bodily pain. Curtis v. Railroad Co., 18 N. Y. 534; Swarthout v. Steamboat Co., 46 Barb. 222. Mental suffering. Gronan v. Kukkuck, 59 Iowa, 18, 12 N. W. 748; Brown v. Railroad Co., 99 Mo. 310, 12 S. W. 655; Central Railroad & Banking Co. v. Lanier, 83 Ga. 587, 10 S. E. 279; Wright v. Compton, 53 Ind. 337.

show the amount of his earnings in a particular business.[20] "As the business is not stated, nor any earnings or loss of earnings mentioned, the allegation referred to can only be construed as intended to characterize the injury, and indicate its extent and permanence in a general way, which amounts simply to a claim for general damages, and lays no foundation at all for proof of special damages. The evidence referred to was not intended simply to show the effect and extent of the injury, but to enhance the damages, by showing the loss of earnings in a special employment, requiring some special skill and training. These damages, therefore, were not the necessary result of the acts set out in the declaration, and could not be implied by law; but they were special damages, which, in order to prevent a surprise upon the defendant, must be particularly specified in the declaration, or the plaintiff will not be permitted to give evidence of them at the trial." [21]

An action for malicious prosecution can be sustained only on proof of damage. The law will not presume damage. Accordingly, special damage must be proved, in order to show an actionable wrong, and only such items of damage as are specially pleaded may be shown. Thus, damages for loss of credit or reputation cannot be recovered unless specially pleaded.[22]

Slanderous words spoken of one with reference to his calling are actionable per se. The law presumes damage. Hence damages may be recovered under the general allegation of damage for a general loss or decrease of trade.[23] But loss of particular customers or sales is special damage, and must be alleged.[24] The loss of use of property is a necessary consequence of its wrongful detention, and damages therefor may accordingly be recovered, though not spe-

[20] Tomlinson v. Derby, 43 Conn. 562. See, also, Wabash W. R. Co. v. Friedman, 146 Ill. 583, 30 N. E. 353, and 34 N. E. 1111.

[21] Taylor v. Town of Monroe, 43 Conn. 36, 46. See, generally, Hunter v. Stewart, 47 Me. 419; Johnson v. Von Kettler, 84 Ill. 315; O'Leary v. Rowan, 31 Mo. 117.

[22] Donnell v. Jones, 13 Ala. 490. See, also, Rowand v. Bellinger, 3 Strob. 373; Stanfield v. Phillips, 78 Pa. St. 73.

[23] Foulger v. Newcomb, L. R. 2 Exch. 327; Evans v. Harries, 1 Hurl. & N. 251.

[24] See Heiser v. Loomis, 47 Mich. 16, 10 N. W. 60; Chicago W. D. R. Co. v. Klauber, 9 Ill. App. 613; Pollock v. Gantt, 69 Ala. 373.

cially pleaded.[25] Expenses incurred in an attempt to avoid the consequences of defendant's wrong are special damages, and must be pleaded.[26]

Damages for the direct losses caused by a breach of contract may be recovered, though not specially pleaded. Such damages are the inevitable and necessary result of a breach. Thus, the profit which would have been realized as the direct result of work done at the contract price may be recovered, though not specially alleged.[27] In an action on an injunction or attachment bond, counsel fees incurred in dissolving the injunction or attachment must be specially pleaded.

PROVINCE OF COURT AND JURY.

92. The measure of damages is a question of law, for the court.

93. The amount of damages is a question of fact, to be determined from the evidence by the jury. The jury are bound to follow the measure of damages laid down by the court.

It has already been stated that in the assessment of damages the general rule is that the measure of damages is a question of law, for the court, and the amount of damages is a question of fact for the jury. It is proposed here to examine more in detail the meaning and application of the general rule. The rule is equally applicable to cases of tort and cases of contract.

Pecuniary Injuries.

Where an injury results only in pecuniary damage, the question for the jury is primarily of what items the loss consists, and, sec-

[25] Woodruff v. Cook, 25 Barb. 505. Contra, Adams v. Gardner, 78 Ill. 568. In trover or replevin, or trespass for the destruction of property, loss of the value of the property is the only damage presumed. Any other damages suffered must be specially pleaded. Schofield v. Ferrers, 46 Pa. St. 438; Brink v. Freoff, 44 Mich. 69, 6 N. W. 94; Stevenson v. Smith, 28 Cal. 102; Burrage v. Melson, 48 Miss. 237.

[26] Patten v. Libbey, 32 Me. 378; Teagarden v. Hetfield, 11 Ind. 522.

[27] Burrell v. Salt Co., 14 Mich. 34. See, also, Laraway v. Perkins, 10 N. Y. 371; Ward v. Smith, 11 Price, 19; Driggs v. Dwight, 17 Wend. 71.

ondly, what is the value of the thing lost. Both of these questions must be determined from the evidence, and according to the rule of damages laid down by the court. This is equally true in cases of contracts and cases of torts. "In cases where a rule can be discovered, the jury are bound to adopt it." [29] The only difference between contracts and torts is that in cases of contract the loss is usually wholly pecuniary, while in cases of tort the loss is perhaps quite as often nonpecuniary as otherwise. The items of loss, and the value of the thing lost, must be proved by evidence. Even in cases where the law will presume damage, it will not presume any definite amount of damage, and the jury are not allowed to find substantial damages in the absence of any evidence as to the actual amount.[30] Where no damages are proved, a verdict for more than nominal damages will be set aside, unless it is a case where exemplary damages are proper.[31] Where damages will not be presumed, the evidence must show substantial damages, or the verdict must be for defendant. Value cannot always be proved with exactness. The jury necessarily have a certain discretion within the range of

[29] Walker v. Smith, 1 Wash. C. C. 152, Fed. Cas. No. 17,086. It is the duty of the court to define the elements of damage, and of the jury to assess them; and when the court fails so to do, but, on the contrary, instructs the jury that they may assess such damages as they think just, and take into consideration as elements of damages any items they think proper, such instruction is erroneous. Union Pac. Ry. Co. v. Shook (Kan. App.) 44 Pac. 685.

[30] See ante, pp. 25, 70. A default admits plaintiff's right to recover some damages, but not the amount of damages. In the absence of evidence as to the amount, plaintiff recovers only nominal damages. Chicago & I. R. Co. v. Baker, 73 Ill. 316. After default there cannot be a verdict for defendant. Nominal damages at least must be given. Ellis v. State, 2 Ind. 262. After default in an action for negligence, defendant may show, for the purpose of reducing damages to a nominal sum, that he was not guilty of negligence. Batchelder v. Bartholomew, 44 Conn. 494. Where plaintiff claims exemplary damages, and defendant defaults, plaintiff must give evidence of circumstances justifying exemplary damages, or they cannot be given. Chicago & I. R. Co. v. Baker, 73 Ill. 316. A demurrer admits all material facts well pleaded, but does not admit the amount of damage. In the absence of proof, only nominal damages can be recovered. Cregan v. Schiele, 53 Conn. 186, 1 Atl. 899, and 5 Atl. 673; Hanley v. Sutherland, 74 Me. 212.

[31] Pittsburgh, C. & St. L. Ry. Co. v. Dewin, 86 Ill. 286; Cochrane v. Tuttle, 75 Ill. 361; Oakley Mills Manuf'g Co. v. Neese, 54 Ga. 459; De Briar v. Minturn, 1 Cal. 450; Smith v. Houston, 25 Ark. 183.

the testimony. But, where the verdict is either much greater or much less than the amount proved, it will be set aside.[32]

"Where there is a legal measure of damages the jury must determine the amount as a fact according to that measure, otherwise the law which measures the compensation would be of no avail; and whether they have done so or not, in a given case, may be proximately seen by a comparison of the verdict with the evidence."[33] If the jury disregards the measure of damages given them by the court, or the court instructs them erroneously as to the measure of damages, the verdict may be set aside.[34] Thus, in an action for breach of contract of sale, the ordinary measure of damages is the difference between the contract price and the market value at the time the goods should have been delivered. If the jury disregard this measure, and find a different sum, the verdict will be set aside. What is the contract price, and what is the market value, are questions of fact, to be determined by the jury from the evidence. The jury may adopt as the market value any value between the highest and lowest values testified to, but the value adopted must be sustained by some evidence.[35] Similarly, in an action in tort for the simple conversion of property, the ordinary measure of damages is the value of the property at the time of conversion, with interest. A verdict for any other sum is erroneous.[36]

Nonpecuniary Injuries.

It is where a wrong causes nonpecuniary injuries that the jury have the widest discretion in determining the amount of damages to be awarded, though even here, as will be presently seen, their discretion is not wholly arbitrary. Nonpecuniary injuries most

[32] Cassell v. Hays, 51 Ill. 261; Ray v. Jeffries, 86 Ky. 367, 5 S. W. 867; Jacksonville, T. & K. W. Ry. Co. v. Roberts, 22 Fla. 324.

[33] Suth. Dam. § 2, cited in Parke v. Frank, 75 Cal. 364, 17 Pac. 427. Where a verdict of a jury rests in calculation, and they find excessive damages, a new trial may be granted. Nutter v. Railroad Co., 13 Ind. 479.

[34] It is the duty of the court to set aside a verdict which is palpably against the law as applied to the facts found. McDonald v. Walter, 40 N. Y. 551, 553.

[35] See Lockwood v. Onion, 56 Ill. 506; Watson v. Harmon, 85 Mo. 443, 447; Nicholson v. Couch, 72 Mo. 209.

[36] See ante, p. 185. In trespass, where the jury fail to give the entire value of the property taken, the verdict will be set aside. Porteous v. Hagel, Harp. (S. C.) 332.

often occur in cases of tort, though they may result from a breach of contract, as, for instance, breach of promise of marriage, or failure to deliver a telegram, resulting in mental suffering. There is no measure of damages possible for physical pain and inconvenience, or mental suffering. The amount of money which shall be considered as compensation for this class of injuries is necessarily left to the sound discretion of the jury. The court can merely instruct them what elements may be considered, and from their own experience and knowledge they must determine the amount to be awarded.[37]

Setting Aside Verdicts.

The court may set aside a verdict when it is against the weight of evidence, but it is with extreme reluctance that the power is exercised. A verdict will not be disturbed unless it is against the decided preponderance of the evidence, or is based on no evidence whatever.[38] Nor will it be disturbed merely because the jury—one or all of them—have reasoned incorrectly. "If such a doctrine were to prevail, scarcely any verdict will stand. The trial by jury is not founded upon a supposition so absurd as that the whole twelve will reason infallibly from the premises to the conclusion." [39]

Same—Excessive and Inadequate Damages.

Where the damages awarded by a jury are excessive or inadequate, the court, in the exercise of a sound discretion, may set the verdict aside. This is substantially on the ground that the verdict is against the evidence. The discretion of the court is not arbitrary. If there is sufficient evidence to support the verdict, it cannot be set aside. When the injury is wholly made up of pecuniary elements, it is usually easy to see whether the damages awarded

[37] The court cannot, merely because the damages are at large, leave the whole matter to the jury. "It must instruct them as to the proper measure of damages. An action is brought against a railroad company for wrongful refusal of admission to the train. The jury is told that plaintiff is entitled to such damages as will, under all the circumstances, compensate him. The verdict cannot stand. 'The court must decide and instruct the jury in respect to what elements and within what limits damages may be estimated in the particular action.' Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052. See Knight v. Egerton, 7 Exch. 407." Sedg. El. Dam. p. 142.

[38] See Perry v. Robinson, 2 Tex. 490.

[39] Per Maule, J., quoted in Sedg. Dam. § 1390.

are supported by the evidence.[40] In many actions of contract the damages may be calculated with almost mathematical certainty. Accordingly, it is in this class of cases that verdicts are most frequently set aside. But even in cases involving nonpecuniary injuries, where there is no fixed measure of damages, and the amount is necessarily left to the sound discretion of a jury, the court may set aside the finding of the jury. In this class of cases, however, it is with the greatest caution and reluctance that the court will interfere.[41] This is because it is very difficult to say, in this class of cases, that the evidence does not support the verdict. It is only in the clearest cases that the court will disturb the verdict.[42] "In

[40] See Connelly v. McNeil, 2 Jones (N. C.) 51 (where interest was wrongfully allowed); Havana, R. & E. R. Co. v. Walsh, 85 Ill. 58 (where a counterclaim was overlooked in estimating damages). See, also, Toledo, P. & W. R. Co. v. Patterson, 63 Ill. 304; Kolb v. O'Brien, 86 Ill. 210; Farwell v. Warren, 70 Ill. 28; St. Louis, I. M. & S. Ry. Co. v. Hall, 53 Ark. 7, 13 S. W. 138; Cram v. Hadley, 48 N. H. 191.

[41] "It must not be supposed, however, that verdicts in cases of torts are beyond control; but they should stand, unless they are grossly erroneous, or there is a palpable misconception of the testimony, or they are the result, plainly, of passion or prejudice." City of Ottawa v. Sweely, 65 Ill. 434, 436. See, also, City of Galesburg v. Higley, 61 Ill. 287; Scherpf v. Szadeczky, 4 E. D. Smith, 110; The Commerce, 16 Wall. 33; Murray v. Buell, 74 Wis. 14, 41 N. W. 1010; Chicago & N. W. Ry. Co. v. Peacock, 48 Ill. 253; Weaver v. Page, 6 Cal. 681 ($15,000 for malicious prosecution sustained); Barth v. Merritt, 20 Mo. 567; Pittsburgh, C. & St. L. Ry. Co. v. Sponier, 85 Ind. 165; Ohio & M. Ry. Co. v. Judy, 120 Ind. 397, 22 N. E. 252; Wunderlich v. Mayor, etc., of New York, 33 Fed. 854; Goodno v. City of Oshkosh, 28 Wis. 300; Tennessee Coal & R. Co. v. Roddy, 85 Tenn. 400, 5 S. W. 286; Goetz v. Ambs, 27 Mo. 28.

[42] Whether or not a verdict is excessive must depend upon the facts of each case. Thus, in Missouri Pac. Ry. Co. v. Peay, 7 Tex. Civ. App. 400, 26 S. W. 768, $4,000 was held not excessive for ejection from a car. But in Hardenbergh v. Railroad Co., 41 Minn. 200, 42 N. W. 933, $800 was held excessive for ejection, and $400 was ordered remitted. $25,000 is not excessive for injuries to a child. Dunn v. Railroad Co., 35 Minn. 73, 27 N. W. 448. Nor to a man rendered a hopeless cripple for life. Hall v. Railroad Co., 46 Minn. 439, 49 N. W. 239; Willard v. Holmes (Com. Pl.) 21 N. Y. Supp. 998. A verdict for $60,000 for false imprisonment lasting 35 days was held excessive. Kilburn v. Thompson, 4 MacArthur, 401. In Smith v. Whittier, 95 Cal. 279-283, 30 Pac. 529, will be found a collection of small verdicts, and at page 284, 95 Cal., and page 529, 30 Pac., of large verdicts. In the following cases verdicts have been held not excessive: Knee hurt, but ex-

all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the court, is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case." [43] The court, in setting aside a verdict for excessive damages, should

ternal recovery, $5,000, Coggswell v. Railway Co., 5 Wash. 46, 31 Pac. 411. Broken rib and roughened pleura, $500, Evans v. City of Huntington, 37 W. Va. 601, 16 S. E. 801. Broken thigh, $2,000, McDowell v. The France, 53 Fed. 843. Collar bone broken and other injuries, $7,500, Galveston, H. & S. A. R. Co. v. Wesch (Tex. Civ. App.) 21 S. W. 313. Right arm and shoulder, $15,000, Morgan v. Railroad Co., 95 Cal. 501, 30 Pac. 601. Displacement of womb, $15,000, City of Chicago v. Leseth, 43 Ill. App. 480. Helpless invalid for life, $15,000, Sears v. Railroad Co., 6 Wash. 227, 33 Pac. 389. Spinal injury, $3,000, Wabash Western Ry. Co. v. Friedman, 41 Ill. App. 270 (reversed on another point [Ill. Sup.] 30 N. E. 353). Finger of left hand, $2,750, Haynes v. Erk, 6 Ind. App. 332, 33 N. E. 627. Permanent injury to lung, $5,000, Fordyce v. Culver, 2 Tex. Civ. App. 569, 22 S. W. 237. Broken leg, thereafter stiff and short, $5,000, Town of Fowler v. Linquist (Ind. Sup.) 37 N. E. 133; $6,500, Selleck v. J. Langdon Co., 59 Hun, 627, 13 N. Y. Supp. 858. Broken skull, crushed hip, and damaged urinary organs, $15,000, Texas & P. R. Co. v. Hohn, 1 Tex. Civ. App. 36, 21 S. W. 942 Fracture of hip, woman of 60, $5,000, City of Kansas City v. Manning, 50 Kan. 373, 31 Pac. 1104. Loss of limbs by woman, $23,000, Erickson v. Railroad Co. (City Ct. Brook.) 32 N. Y. Supp. 915. Injury to eyes, ears, shoulder, and arm, $3,000, Sabine & E. T. R. Co. v. Ewing, 1 Tex. Civ. App. 531, 21 S. W. 700. Loss of eyes, $10,000, Mather v. Rillston, 156 U. S. 391, 15 Sup. Ct. 464. Amputation of left arm, etc., $10,000, Baltzer v. Railroad Co., 89 Wis. 257, 60 N. W. 716. In cases of willful violence, $9,000, Townsend v. Briggs (Cal.) 32 Pac. 307; $2,000, Wohlenberg v. Melchert, 35 Neb. 803, 53 N. W. 982. Arm, $10,000, Flanders v. Railroad Co., 51 Minn. 193, 53 N. W. 544. Loss of leg, $25,000, Ehrman v. Railroad Co., 131 N. Y. 576, 30 N. E. 67. Libel, $45,000, Smith v. Times Co., 4 Pa. Dist. R. 399. The following verdicts have been held excessive: Foot, $12,000, Kroener v. Railroad Co., 88 Iowa, 16, 55 N. W. 28; $3,000, Kennedy v. Railroad Co. (Minn.) 60 N. W. 810. Two fingers, $5,000, Louisville & N. R. Co. v. Foley, 94 Ky. 220, 21 S. W. 866. Fracture of smaller bone of ankle, $1,100, Bronson v. Railway Co., 67 Hun, 649, 21 N. Y. Supp. 695; Louisville & N. R. Co. v. Survant (Ky.) 27 S. W. 999. Amputation of first joint of left thumb, $2,000, Louisville & N. R. Co. v. Law (Ky.) 21 S. W. 648. In case of willful violence, $5,000, Roades v. Larson, 66 Hun, 635, 21 N. Y. Supp. 855. For dishonor of a check, $450, Schaffner v. Ehrman (Ill. Sup.) 28 N. E. 917.

[43] Worster v. Bridge Co., 16 Pick. 541.

clearly see that they are excessive; that there has been a gross error; that there has been a mistake of the principles upon which the damages have been estimated, or that some improper motive or feelings or bias has influenced the minds of the jury. Upon a mere matter of damages, where different minds might well arrive at different conclusions, and there is nothing inconsistent with an honest exercise of judgment, the verdict of the jury should not be disturbed.[44] "A court of law will not set aside a verdict, upon the ground of excessive damages, unless in a clear case, where the jury have acted upon a gross mistake of facts, or have been governed by some improper influence or bias, or have disregarded the law."[45] "The rule so carefully maintained and guarded in actions upon contracts, and for tortious injuries to property, is incapable of being applied when the injury is to the person, for those injuries are without precise pecuniary measure. The law has, accordingly, in this class of cases, committed the determination of the amount of damages to be awarded to the experience and good sense of jurors. And, where the verdict rendered by them may reasonably be presumed to have resulted from an honest and intelligent exercise of judgment upon their part, the policy of the court is, and necessarily must be, not to interfere with their conclusion."[46]

Where the damages found by a jury are inadequate the verdict will be set aside, on the same principles that apply when the damages are excessive. It has been held that in actions of tort, as a general rule, the verdict will not be set aside because the damages were too small.[47] But the rule is now established otherwise.[48] "A verdict for a grossly inadequate amount stands upon no higher

[44] Thurston v. Martin, 5 Mason, 497, Fed. Cas. No. 14,018.

[45] Wiggin v. Coffin, 3 Story, 1, Fed. Cas. No. 17,624. See, also, Gilbert v. Burtenshaw, Cowp. 230; Whipple v. Manufacturing Co., 2 Story, 661, Fed. Cas. No. 17,516; Harris v. Railroad Co., 35 Fed. 116.

[46] Walker v. Railway Co., 63 Barb. 260, 267.

[47] Howard v. Barnard, 11 C. B. 653; Hayward v. Newton, 2 Strange, 940; Lord Townsend v. Hughes, 2 Mod. 150; Barker v. Dixie, 2 Strange, 1051. Cf. Pritchard v. Hewitt, 91 Mo. 547, 4 S. W. 437.

[48] Beattle v. Moore, L. R. 2 Ir. 28, 31; Robinson v. Town of Waupaca, 77 Wis. 544, 46 N. W. 809; Pritchard v. Hewitt, 9 Mo. 547, 4 S. W. 437; Watson v. Harmon, 85 Mo. 443; Caldwell v. Railroad Co., 41 La. Ann. 624, 6 South.

ground in legal principle, nor in the rules of law or justice, than a verdict for an excessive or extravagant amount. It is doubtless true that instances of the former occur less frequently, because it is less frequently possible to make it clearly appear that the jury have grossly erred. But, when the case does plainly show the result, justice as plainly forbids that the plaintiff should be denied what is his due as that the defendant should pay what he ought not to be charged." [49] It was accordingly held that a verdict for the plaintiff for a sum far less than he was entitled to recover under any evidence in the case, provided he was entitled to recover at all, would be set aside, on application of the plaintiff, although, upon the evidence, a verdict for the defendant would not have been disturbed.[50]

Where the verdict is excessive the plaintiff may frequently cure the error by remitting the excess. Where an item of damage has been erroneously included in the estimate by the jury, the error may be cured by remitting the amount allowed for such item, provided it can be definitely ascertained; [51] otherwise not.[52] In the case of nonpecuniary injuries, where the verdict of the jury is final, unless it shows that the jury were influenced by partiality, prejudice, or passion, the plaintiff has been permitted to remit enough to prevent the verdict from being excessive. It is a common practice for both trial and appellate courts to indicate the amount by which they deem the verdict excessive, and require the plaintiff to remit it, as

[49] McDonald v. Walter, 40 N. Y. 551, 554.

[50] Id. A verdict awarding nominal damages for a serious personal injury will be set aside. Beattie v. Moore, L. R. 2 Ir. 28; Robbins v. Railroad Co., 7 Bosw. 1; Falvey v. Stanford, L. R. 10 Q. B. 54. Cf. Richards v. Rose, 9 Exch. 218. See, also, Richards v. Sandford, 2 E. D. Smith, 349; Alloway v. City of Nashville, 88 Tenn. 510, 13 S. W. 123 (interest added on appeal); Howard v. Barnard, 11 C. B. 653. In Phillips v. Railway Co., 5 Q. B. Div. 78, a verdict for £7,000 was set aside as inadequate. On the second trial a verdict for £16,000 was held not excessive. 5 C. P. Div. 280.

[51] Toledo, W. & W. Ry. Co. v. Beals, 50 Ill. 150; Strong v. Hooe, 41 Wis. 659; Kavanaugh v. City of Janesville, 24 Wis. 618; Evertson v. Sawyer, 2 Wend. 507; Howard v. Grover, 28 Me. 97; Lambert v. Craig, 12 Pick. 199; King v. Howard, 1 Cush. 137; Pendleton St. R. Co. v. Rahmann, 22 Ohio St. 446. Cf. Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696.

[52] Pavey v. Insurance Co., 56 Wis. 221, 13 N. W. 925; Smith v. Dukes, 5 Minn. 373 (Gil. 301). See, also, St. Louis, I. M. & S. Ry. Co. v. Hall, 53 Ark. 7, 13 S. W. 138; Hodapp v. Sharp, 40 Cal. 69; Lambert v. Craig, 12 Pick. 199.

a condition of refusing a new trial.[53] It is a grave question whether this practice does not deprive the parties of the right to trial by jury, and it would seem to be an invasion of the province of the jury,[54] but the practice is supported by the weight of authority.[55]

Exemplary Damages.

It is a question for the court to determine whether there is any evidence to support a verdict for exemplary damages.[56] It is a question for the jury to determine whether exemplary damages shall be awarded.[57] It is error to instruct the jury to give exemplary damages.[58] It is error to submit the question to them where there

[53] Upham v. Dickinson, 50 Ill. 97; Johnson v. Von Kettler, 66 Ill. 63; Duffy v. City of Dubuque, 63 Iowa, 171, 18 N. W. 900; Collins v. City of Council Bluffs, 35 Iowa, 432; Hegeman v. Railroad Corp., 13 N. Y. 9; Diblin v. Murphy, 3 Sandf. 19; Whitehead v. Kennedy, 69 N. Y. 462, 470; Spicer v. Railway Co., 29 Wis. 580; Holmes v. Jones, 121 N. Y. 461, 24 N. E. 701; Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468; Patten v. Railway Co., 32 Wis. 524; Baker v. City of Madison, 62 Wis. 137, 22 N. W. 141, 583; Van Winter v. Henry Co., 61 Iowa, 684, 17 N. W. 94; Lombard v. Railroad Co., 47 Iowa, 494; Johnston v. Morrow, 60 Mo. 339. See Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880.

[54] See dissenting opinions in Burdict v. Railway Co., 123 Mo. 221, 27 S. W. 453. See, also, Suth. Dam. § 460; Sherry v. Frecking, 4 Duer, 452; Koeltz v. Bleckman, 46 Mo. 320; Leeson v. Smith, 4 Nev. & Man. 304; Savannah, F. & W. Ry. v. Harper, 70 Ga. 119; Carlisle v. Callahan, 78 Ga. 320, 2 S. E. 751; Craig v. Cook, 28 Minn. 238, 9 N. W. 712; Potter v. Railroad Co., 22 Wis. 586.

[55] Baker v. City of Madison, 62 Wis. 137, 22 N. W. 141, 583; Pratt v. Pioneer Press Co., 35 Minn. 251, 28 N. W. 708; Hutchins v. Railway Co., 44 Minn. 5, 46 N. W. 79; Town of Union v. Durkes, 38 N. J. Law, 21; Missouri Pac. Ry. Co. v. Dwyer, 36 Kan. 58, 12 Pac. 352; Hopkins v. Orr, 124 U. S. 510, 8 Sup. Ct. 590; Arkansas Val. Land & Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458.

[56] Philadelphia Traction Co. v. Orbann, 119 Pa. St. 37, 12 Atl. 816; Pittsburgh S. Ry. Co. v. Taylor, 104 Pa. St. 306; Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456; Selden v. Cashman, 20 Cal. 56.

[57] Nagle v. Mullison, 34 Pa. St. 48; Graham v. Railroad Co., 66 Mo. 536; Chicago, St. L. & N. O. Ry. Co. v. Scurr, 59 Miss. 456; Johnson v. Smith, 64 Me. 553; Smith v. Thompson, 55 Md. 5; Pratt v. Pond, 42 Conn. 318; Dye v. Denham, 54 Ga. 224.

[58] Wabash, St. L. & P. Ry. Co. v. Rector, 104 Ill. 296; Hawk v. Ridgway, 33 Ill. 473; New Orleans, St. L. & C. R. Co. v. Burke, 53 Miss. 200; Southern R. Co. v. Kendrick, 40 Miss. 374; Louisville & N. R. Co. v. Brooks' Adm'x,

is no evidence to support a verdict for exemplary damages.[59]

A verdict for exemplary damages may be set aside when it is clearly excessive.[60] The court proceeds on the same principle as in other cases of excessive damages. The verdict will be set aside only when it is grossly excessive, or the jury acted under the influence of passion, prejudice, or some other improper motive.[61]

83 Ky. 129; Boardman v. Goldsmith, 48 Vt. 403; Snow v. Carpenter, 49 Vt. 426. Contra, Mayer v. Duke, 72 Tex. 445, 10 S. W. 565. An instruction that "this is one of the cases where they may give exemplary damages" was held erroneous, where the facts were in dispute. Pickett v. Crook, 20 Wis. 358. Under Code Iowa, § 1557, providing that the person injured in her means of support by the intoxication of another shall have a right of action, against the person selling the liquor, "for all damages actually sustained, as well as exemplary damages," it was held proper to instruct the jury that, if plaintiff was entitled to actual damages, it was their duty to add thereto an amount as exemplary damages. Thill v. Pohlman, 76 Iowa, 638, 41 N. W. 385. See, also, Fox v. Wunderlich, 64 Iowa, 187, 20 N. W. 7. So an instruction that, if an assault was accompanied by certain aggravating circumstances, the jury ought to give exemplary damages, was held not erroneous. Hooker v. Newton, 24 Wis. 292. An instruction that the jury cannot give vindictive damages "unless they believe, from the evidence, that the defendants maliciously entered upon plaintiff's land in a rude, aggravating, or insulting manner," is erroneous, because it improperly restricts the standard of liability. De Vaughn v. Heath, 37 Ala. 595.

[59] See cases cited in note 56, supra.

[60] With this limitation, the amount of exemplary damages is discretionary with the jury. Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456; Borland v. Barrett, 76 Va. 128.

[61] Cutler v. Smith, 57 Ill. 252; Farwell v. Warren, 70 Ill. 28; Collins v. City of Council Bluffs, 35 Iowa, 432; Goetz v. Ambs, 27 Mo. 28; Rogers v. Henry, 32 Wis. 327; Borland v. Barrett, 76 Va. 128; Flannery v. Railroad Co., 4 Mac. 111. See, also, Bryan v. Acee, 27 Ga. 87; Willis v. McNeill, 57 Tex. 465. In New Orleans, J. & G. N. R. Co. v. Hurst, 36 Miss. 660, a verdict of $4,500 against a railroad company for carrying plaintiff 400 yards beyond a station and refusing to return was sustained. In Burkett v. Lanata, 15 La. Ann. 337, it is said: "Exemplary damages should nevertheless be commensurate to the nature of the offense, and when extravagant damages are allowed they will be reduced to their proper standard."

CHAPTER IX.

BREACH OF CONTRACTS FOR SALE OF GOODS.

94–96. Action by Seller—Where Property has not Passed—Damages for Nonacceptance.
97. Where Property has Passed—Damages for Nonpayment.
98–99. Action by Buyer—Damages for Nondelivery.
100. Damages as for Conversion.
101. Damages for Breach of Warranty.

ACTION BY SELLER—WHERE PROPERTY HAS NOT PASSED —DAMAGES FOR NONACCEPTANCE.

94. If the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

95. Where the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed.

96. The measure of damages for nonacceptance is the estimated loss directly and naturally resulting from the breach of contract in the natural course of events, and, when there is an available market for the goods, is prima facie to be ascertained by the difference between the contract price and the market price at the agreed time and place of delivery.

When the property in the goods has not passed, as where the contract is for the sale of unascertained goods or of goods which are not in a deliverable state, the buyer's breach of his promise to accept and pay for them can only affect the seller by way of damages. The goods are still his. He may resell them or not, at his pleasure.

His only remedy, therefore, is an action against the buyer for nonacceptance.[1] To this general rule there is only the one exception, which has been above stated, that, if by the terms of the contract the price is payable irrespective of delivery, the seller may sue for the price at the time agreed upon, leaving the buyer to his cross action in case the seller, after receiving the price, should fail to deliver the goods.[2]

Damages for Nonacceptance.

The proper measure of damages for nonacceptance is generally the difference between the contract price and the market price at the place of delivery at the time when the contract is broken, because the seller may take his goods into the market, and obtain the current price for them.[3] If the goods have no market price, the damages must, of course, be otherwise ascertained;[4] and if they have no money value the measure of damages would be equal to the whole contract price.[5] The date at which the contract is deemed to be broken is that fixed by the contract for the delivery, and not that at which the buyer may give notice that he intends to break the contract and refuse accepting the goods.[6] If the contract is for

[1] Laird v. Pim, 7 Mees. & W. 474, 478; Collins v. Delaporte, 115 Mass. 159, 162; Gordon v. Norris, 49 N. H. 376; Danforth v. Walker, 37 Vt 239; Atwood v. Lucas, 53 Me. 508; Brand v. Henderson, 107 Ill. 141; Ganson v. Madigan, 13 Wis. 68; Chapman v. Ingram, 30 Wis. 290, 294; Peters v. Cooper, 95 Mich. 191, 54 N. W. 694; Benj. Sales, § 758.

[2] Dunlop v. Grote, 2 Car. & K. 153.

[3] Barrow v. Arnaud, 8 Q. B. 595, 608, per Tindal, C. J. See, also, Tufts v. Bennett, 163 Mass. 398, 40 N. E. 172; Cherry Valley Iron Works v. Florence Iron R. Co., 12 C. C. A. 306, 64 Fed. 569; Gray v. Railroad Co., 82 Hun, 523, 31 N. Y. Supp. 704.

[4] Chicago v. Greer, 9 Wall. 726; McCormick v. Hamilton, 23 Grat. 561. Where there was no market, the proper measure of damages was the actual loss which the sellers, acting as reasonable men in the ordinary course of business, had sustained. Dunkirk Colliery Co. v. Lever, 9 Ch. Div. 20, 25. Where an article has no market value, an investigation into the constituent elements of the cost to the party who contracted to furnish it becomes necessary, and that cost, compared with the contract price, will afford the measure of damages. Masterton v. Mayor, etc., 7 Hill, 61.

[5] Allen v. Jarvis, 20 Conn. 38. Cf. Chicago v. Greer, 9 Wall. 726.

[6] Boorman v. Nash, 9 Barn. & C. 145; Phillpotts v. Evans, 5 Mees. & W.

the sale of goods to be manufactured, or otherwise procured by the seller, and the buyer refuses to accept or gives notice that he intends to refuse acceptance, so that the seller is excused from procuring and tendering the goods, he will be entitled to such damages as will put him in the same position as if he had been permitted to complete the contract.[7] Thus where the contract was for the sale of rails to be rolled by the seller, "and to be drilled as he may be directed," at $58 per ton, and the buyer refused to give directions for drilling, and at his request the seller delayed rolling until after the time prescribed for their delivery, and then the buyer advised the seller that he should decline to take any of the rails under the contract, it was held that the seller was not bound to roll the rails and tender them, and that the proper rule of damages was the difference between the cost per ton of making and delivering the rails and $58.[8]

When the contract is for the sale of a chattel to be made to order, there is a conflict of authority as to whether the property passes on completion, or whether acceptance by the buyer is essential to the appropriation; and in such cases, whether an action can be maintained for the price or whether the seller is confined to an action for damages for nonacceptance will depend on the rule adopted in the particular jurisdiction as to what is necessary to transfer the property.

475; Thompson v. Alger, 12 Metc. (Mass.) 428, 443; Schramm v. Boston Sugar-Refining Co., 146 Mass. 211, 15 N. E. 571; Gordon v. Norris, 49 N. H. 376; Girard v. Taggart, 5 Serg. & R. 19; Dana v. Fiedler, 12 N. Y. 40; Camp v. Hamlin, 55 Ga. 259; Williams v. Jones, 1 Bush, 621; Pittsburgh, C. & St. L. Ry. Co. v. Heck, 50 Ind. 303; Sanborn v. Benedict, 78 Ill. 309; Kadish v. Young, 108 Ill. 170.

[7] Cort v. Ambergate N. & B. & E. J. Ry. Co., 17 Q. B. 127, 20 Law J. Q. B. 460; Hinckley v. Pittsburgh Bessemer Steel Co., 121 U. S. 264, 7 Sup. Ct. 875; Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210; Muskegon Curtain-Roll Co. v. Keystone Manuf'g Co., 135 Pa. St. 132, 19 Atl. 1008; Hosmer v. Wilson, 7 Mich. 295; Haskell v. Hunter, 23 Mich. 305; Butler v. Butler, 77 N. Y. 472.

[8] Hinckley v. Pittsburgh Bessemer Steel Co., 121 U. S. 264, 7 Sup. Ct. 875.

SAME—WHERE PROPERTY HAS PASSED—DAMAGES FOR NONPAYMENT.

97. Where, under a contract of sale, the property in the goods has passed to the buyer, and he wrongfully neglects or refuses to pay for them according to the terms of the contract, the seller may maintain an action against him for the price of the goods.[9]

When the property in the goods has passed, unless the sale is on credit or payment is made to depend on some contingency, the seller may maintain an action for the price.[10] If the sale is on credit, he must, of course, await the termination of the credit before bringing suit.[11] And if the price is payable by a bill or other security, and the security is not given, the seller cannot sue for the price until the bill would have matured, though he may sue at once for damages for breach of the agreement, in which case the measure of his damages will be prima facie the amount of the sum to be secured.[12]

In England it is held that the seller is not entitled, under any circumstances, to rescind the contract for default in the payment of the price;[13] but in this country it has been frequently declared that the unpaid seller, who is in possession of the goods, has, among other remedies, the right to keep the goods as his own, and recover

[9] Chalm. Sale, § 51.

[10] Scott v. England, 2 Dowl. & L. 520; Stearns v. Washburn, 7 Gray, 187, 189; Morse v. Sherman, 106 Mass. 430; Frazier v. Simmons, 139 Mass. 531, 535, 2 N. E. 112; Hayden v. Demets, 53 N. Y. 426; Doremus v. Howard, 23 N. J. Law, 390; Armstrong v. Turner, 49 Md. 589; Ganson v. Madigan, 13 Wis. 67.

[11] Calcutta & B. Steam Nav. Co. v. De Mattos, 32 Law J. Q. B. (N. S.) at page 328; Keller v. Strasberger, 90 N. Y. 379; Dellone v. Hull, 47 Md. 112. Mere insolvency of one of the parties is not equivalent to a rescission or a breach. It simply relieves the seller from his agreement to give credit. Pardee v. Kanady, 100 N. Y. 121, 126, 2 N. E. 885. Cf. New England Iron Co. v. Gilbert Elevated R. Co., 91 N. Y. 153, 168.

[12] Paul v. Dod, 2 C. B. 800; Rinehart v. Olwine, 5 Watts & S. 157; Hanna v. Mills, 21 Wend. 90; Barron v. Mullin, 21 Minn. 374. But see Foster v. Adams, 60 Vt. 392, 15 Atl. 169.

[13] Martindale v. Smith, 1 Q. B. 389.

the difference between the market price at the time and place of delivery and the contract price.[14]

ACTION BY BUYER—DAMAGES FOR NONDELIVERY.

98. Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for nondelivery.

99. The measure of damages is the estimated loss directly and naturally resulting from the seller's breach of contract, and, when there is an available market for the goods in question, is prima facie to be ascertained by the difference between the contract price and the market price of the goods at the agreed time and place of delivery.[15]

The breach of contract of which the buyer complains may arise from the seller's default in delivering the goods, or from some defect in the goods delivered. There may be a breach of the principal contract for the transfer of the property and the delivery of possession or of a collateral contract of warranty.

Damages for Nondelivery.

Before the property has been transferred to the buyer, his only remedy is an action for breach of contract. If he has paid the price, and the goods are not delivered, he may rescind the contract, and recover what he has paid upon an implied contract in an action for money had or received.[16] If he has not paid the price, his only remedy, where the seller fails to deliver, is to sue for damages for

[14] Dustan v. McAndrew, 44 N. Y. 73; Hayden v. Demets, 53 N. Y. 426; Mason v. Decker, 72 N. Y. 595; Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. 415; Barr v. Logan, 5 Har. (Del.) 52; Young v. Mertens, 27 Md. 114, 126; Cook v. Brandeis, 3 Metc. (Ky.) 555; Bagley v. Findlay, 82 Ill. 524; Ames v. Moir, 130 Ill. 582, 22 N. E. 535. See, also, Putnam v. Glidden, 159 Mass. 47, 34 N. E. 81.

[15] See Chalm. Sale, § 53.

[16] Nash v. Towne, 5 Wall. 689; Cleveland v. Sterrett, 70 Pa. St. 204.

breach of the contract. His position is the converse of that of the seller who is suing the buyer for nonacceptance. He has the money in his hands, and may go into the market and buy. The loss which he sustains by the nondelivery of the goods is therefore, under ordinary circumstances, simply the difference between the contract price and the market price of the goods at the time and place of delivery, and this is the measure of his damages.[17] If he has prepaid the price, he may still sue for nondelivery, and is entitled to recover the market price of the goods without deduction.[18] If there is no differ-

[17] Barrow v. Arnaud, 8 Q. B. 604, at page 609; Shaw v. Nudd, 8 Pick. 9; Dana v. Fiedler, 12 N. Y. 40; Cahen v. Platt, 69 N. Y. 348; Fessler v. Love, 48 Pa. St. 407; Kribs v. Jones, 44 Md. 396; Miles v. Miller, 12 Bush, 134; McKercher v. Curtis, 35 Mich. 478; Cockburn v. Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49; McGrath v. Gegner, 77 Md. 331, 26 Atl. 502; Olson v. Sharples, 53 Minn. 91, 55 N. W. 125; Hewson-Herzog Supply Co. v. Minnesota Brick Co., 55 Minn. 530, 57 N. W. 129. In case of a total failure to deliver, the buyer may recover the amount with which he could have purchased machines of equal value. If those delivered were defective, the measure of his damages is the cost of supplying the deficiency. Marsh v. McPherson, 105 U. S. 709. See, also, Stillwell & Bierce Manuf'g Co. v. Phelps, 130 U. S. 520, 9 Sup. Ct. 601. When the market value is unnaturally inflated by unlawful means, it is not the true test. Kountz v. Kirkpatrick, 72 Pa. St. 376. Where goods are purchased to be shipped abroad, and the fact is known to the seller, and it is impossible for the buyer to discover the inferiority of the goods till they reach their ultimate destination, the measure of damages is the difference between the market price of the goods contracted for at the date of arrival and the price afterwards realized on a sale of the goods, with costs and expenses of sales. Camden Consolidated Oil Co. v. Schlens, 59 Md. 31. Where a job lot of chattels is sold, and the vendor has title only to part, the measure of damages is the difference between the value of the entire lot sold and the value of the lot without those as to which the title failed. Hoffman v. Chamberlain, 40 N. J. Eq. 663, 5 Atl. 150. In an action for breach of contract to deliver goods sold, defendant can show the actual cost to the plaintiff of the goods which plaintiff bought from other parties to fill his orders for the goods purchased. Theiss v. Weiss, 166 Pa. St. 9, 31 Atl. 63.

[18] Startup v. Cortazzi, 2 Cromp., M. & R. 165; Smethurst v. Woolston, 5 Watts & S. 106; Humphreysville Copper Co. v. Vermont Copper Min. Co., 33 Vt. 92. Some courts allow the buyer to recover the highest market price between the breach and the action. Clark v. Pinney, 7 Cow. 681; Gilman v. Andrews, 66 Iowa, 116, 23 N. W. 291; Suydam v. Jenkins, 3 Sandf. 614; Benj. Sales (Bennett's 6th Am. Ed.) 901, note.

ence between the contract price and the market price, he is entitled only to nominal damages.[19]

Even if the seller repudiates the contract before the date of delivery, so that the buyer may sue at once, the damages are to be assessed as of the agreed date of delivery, unless it appears that the buyer could have supplied himself in the market on such terms as to mitigate his loss.[20] But, if the time of delivery is extended at the seller's request, damages will be assessed according to the market price at the date to which delivery is postponed.[21]

Damages where there is no Market Price.

To the rule of market price there are some exceptions, depending on particular circumstances. The goods may have no market price at the place of delivery for lack of a market, in which case the market value may be determined by ascertaining the market price in the nearest available market, and adding the expense of fetching the goods to the place of delivery;[22] or, if there is no available market, the market value may be determined by ascertaining the cost of manufacturing the goods, if that is the natural and reasonable way to procure them;[23] or, if the exact description of goods

[19] Valpy v. Oakeley, 16 Q. B. 941; Moses v. Rasin, 14 Fed. 772; Fessler v. Love, 48 Pa. St. 407; Wire v. Foster, 62 Iowa, 114, 17 N. W. 174. Nominal damages only will be awarded for failure to deliver certain paid-up stock, which has not been issued, and which has no market or actual value, though it would have cost its par value to procure it, since the measure of damages is not the cost of procuring it, but the loss sustained by failure to receive it. Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760.

[20] Roper v. Johnson, L. R. 8 C. P. 167; Austrian & Co. v. Springer, 94 Mich. 343, 54 N. W. 50. Duty of vendee to supply himself elsewhere. Miller v. Trustees, 7 Greenl. 51. Cf. Brown v. Muller, L. R. 7 Exch. 319. Several deliveries. Merrimack Manuf'g Co. v. Quintard, 107 Mass. 127; Booth v. Rolling Mill Co., 60 N. Y. 487; McHose v. Fulmer, 73 Pa. St. 365.

[21] Ogle v. Earl Vane, L. R. 3 Q. B. 272; Hickman v. Haynes, L. R. 10 C. P. 598; Roberts v. Benjamin, 124 U. S. 64, 8 Sup. Ct. 393; Hill v. Smith, 34 Vt. 535; McDermid v. Redpath, 39 Mich. 372; Brown v. Sharkey (Iowa) 61 N. W. 364.

[22] Grand Tower Co. v. Phillips, 23 Wall. 471; Furlong v. Polleys, 30 Me. 491; Cahen v. Platt, 69 N. Y. 348; Johnson v. Allen, 78 Ala. 387.

[23] Paine v. Sherwood, 21 Minn. 225. Where there is no market price, but the goods have been resold, the price paid plus the profits on the resale may be recovered. Trigg v. Clay, 88 Va. 330, 13 S. E. 434.

cannot be obtained, the damages may be fixed by the price of the best substitute obtainable, if it is reasonable for the buyer to take that course.[24] If no substitute is obtainable, the buyer may be entitled to special damages.[25]

Special Damages.

As in other classes of contracts, the damages may be special as well as general. The measure of general damages is the loss directly and naturally resulting from the breach of the contract, under ordinary circumstances. The rule as to market price flows naturally from this general principle. The measure of special damages is the loss directly and naturally resulting from the breach of contract under the special circumstances of the case as contemplated by the parties.[26] Each case involving special damages must be determined by its own merits. Special damages are not recoverable, unless alleged with sufficient particularity to enable the defendant to meet the demand.[27]

Communication of Special Circumstances.

The seller cannot be charged with special damages, unless he had knowledge of the special circumstances from which the special loss

[24] Hinde v. Liddell, L. R. 10 Q. B. 265. The buyer must always make reasonable exertions to mitigate his damages. Hammer v. Schoenfelder, 47 Wis. 455, 2 N. W. 1129. The measure of damages for breach of contract to furnish certain kinds of coal for a particular purpose is, in case the buyer is forced to purchase a more expensive grade, the difference in price, when the cheaper grade would have answered exactly the same purpose. Consolidated Coal Co. of St. Louis v. Block & Hartman Smelting Co., 53 Ill. App. 565.

[25] Parsons v. Sutton, 66 N. Y. 92; Richardson v. Chynoweth, 26 Wis. 656. Some courts, however, permit the buyer to recover his actual loss by way of general damages, on the ground that, where an article of similar quality cannot be procured, this is a contingency which must be considered to have been within the contemplation of the parties, who are presumed to know whether the article is of limited production or not. McHose v. Fulmer, 73 Pa. St. 365; Culin v. Woodbury Glass Works, 108 Pa. St. 220; Bell v. Reynolds, 78 Ala. 511. See, also, Carroll Porter Boiler & Tank Co. v. Columbus Mach. Co., 5 C. C. A. 190, 55 Fed. 451.

[26] Hadley v. Baxendale, 9 Exch. 341, 354, 23 Law J. Exch. 179; Griffin v. Colver, 16 N. Y. 489. See, also, Cassidy v. Le Fevre, 45 N. Y. 562.

[27] Smith v. Thomas, 2 Bing. N. C. 372; Parsons v. Sutton, 66 N. Y. 92; Furlong v. Polleys, 30 Me. 491. See ante, p. 223.

would be likely to result;[28] and while, if he had such knowledge, he will generally be charged,[29] it is important to bear in mind that mere communication of the special circumstances is not enough unless it be given under such circumstances as reasonably to imply that it formed the basis of the agreement,—that is, unless the circumstances are such that it must be supposed that a reasonable man would have had them in contemplation as a probable result of the breach of the contract.[30]

A seller is usually bound for such damages as result to the buyer from being deprived of the ordinary use of a chattel, but not for such damages as result to him from being deprived of its use for a special or extraordinary purpose, which was not communicated.[31] So the buyer is not usually entitled to damages arising from loss of profits on a subsale, or from penalties or expenses incurred by him from inability to execute such subsale;[32] but he may recover such

[28] Cory v. Thames Iron Works & Ship Bldg. Co., L. R. 3 Q. B. 181, 37 Law J. Q. B. 68; British Columbia & V. I. Spar, Lumber & Sawmill Co. v. Nettleship, L. R. 3 C. P. 499, 37 Law J. C. P. 235; Bartlett v. Blanchard, 13 Gray, 429; Fessler v. Love, 48 Pa. St. 407; Billmeyer v. Wagner, 91 Pa. St. 92; Paine v. Sherwood, 19 Minn. 315 (Gil. 270); Mihills Manuf'g Co. v. Day, 50 Iowa, 250; Peace River Phosphate Co. v. Grafflin, 58 Fed. 550; Masterton v. Mayor, etc., 7 Hill, 61.

[29] Smeed v. Foord, 1 El. & El. 602, 28 Law J. Q. B. 178 (loss of crop from delay in furnishing threshing machine). A seller who contracts to supply a butcher with ice, knowing it is required to preserve meat, is liable if the meat spoils in consequence of his failure to supply, and the buyer is unable to supply himself elsewhere. Hammer v. Schoenfelder, 47 Wis. 455, 2 N. W. 1129. The full amount of damage to lettuce growing in a greenhouse, and frozen by reason of failure to supply water for steam heating, is the measure of damages for such failure. Watson v. Inhabitants of Needham, 161 Mass. 404, 37 N. E. 204.

[30] British Columbia & V. I. Spar, Lumber & Sawmill Co. v. Nettleship, cited in note 28; Horne v. Midland Ry. Co., L. R. 7 C. P. 583, 591, L. R. 8 C. P. 131, per Willes, J.; Booth v. Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487, 496.

[31] Cory v. Thames Iron Works & Ship Bldg. Co., L. R. 3 Q. B. 181, 37 Law J. Q. B. 68. On a contract to deliver furniture for an hotel, set up in the rooms and ready for use on a certain date, damages for delay in performance is measured by the rental value of the rooms when furnished, during the delay. Berkey & Gay Furniture Co. v. Haskell, 123 Ind. 502, 24 N. E. 336.

[32] Williams v. Reynolds, 6 Best & S. 495, 34 Law J. Q. B. 221; Devlin v.

damages if the subsale and the other special circumstances necessary to advise him of the probable consequences of a breach were communicated to the seller.[33]

SAME—DAMAGES AS FOR CONVERSION.

100. Where under a contract of sale the property in the goods has passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action for conversion of the goods against the seller and recover their value.[34]

When the property has passed, if the seller refuses to deliver, the buyer has the same right of action for nondelivery as if the property had not passed; but he has, in addition to his right of action on the contract, the rights of an owner. He has not only the property in the goods, but the right of possession, defeasible in the case of his failure to pay for the goods.[35] If he is not in default, therefore, he may, on the refusal of the seller to deliver, maintain an action for conversion. As a rule, the measure of the buyer's damages in such an action, either against the seller[36] or a third person, who has dealt with the goods under such circumstances as to amount to a conversion,[37] is the value of the goods at the time of the conversion. But he cannot recover greater damages against the seller by suing in tort than by suing on the contract; and, if he

Mayor, etc., 63 N. Y. 8; Cockburn v. Ashland Lumber Co., 54 Wis. 619, 627, 12 N. W. 49. See, also, Fox v. Harding, 7 Cush. 516; Borries v. Hutchinson, 18 C. B. (N. S.) 445.

[33] Elbinger Actien-Gesellschafft für Fabrication von Eisenbahn Materiel v. Armstrong, L. R. 9 Q. B. 473; Hydraulic Engineering Co. v. McHaffie, 4 Q. B. Div. 670; Grebert-Borgnis v. Nugent, 15 Q. B. Div. 85; Messmore v. New York Shot & Lead Co., 40 N. Y. 422; Booth v. Spuyten Duyvill Rolling Mill Co., 60 N. Y. 487.

[34] See Chalm. Sale, § 54.

[35] Benj. Sales, §§ 883, 886.

[36] Kennedy v. Whitwell, 4 Pick. 466; Philbrook v. Eaton, 134 Mass. 398.

[37] Chinery v. Viall, 5 Hurl. & N. 288, 29 Law J. Exch. 180; France v. Gaudet, L. R. 6 Q. B. 199.

has not paid for the goods, the measure of his damages will be the difference between the contract price and the market value.[38]

SAME—DAMAGES FOR BREACH OF WARRANTY.

101. The measure of damages for breach of warranty of fitness, quality, or condition is the estimated loss, directly resulting from the breach of warranty. Such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered the warranty.

That the buyer may bring an action for damages in case the goods are inferior in quality to that warranted, follows from the general rule that an action for damages lies in every case of a breach of contract.[39]

Diminution of Damages—Recoupment.

Instead of bringing an action for damages, the buyer may wait till he is sued for the price, and then set up the breach of warranty in diminution pro tanto of the damages.[40] And at common law this was his only way of availing himself of a breach of warranty as a defense. The rule was stated by Parke, B., in the leading case of Mondel v. Steel,[41] as follows: "Formerly it was the practice when an action was brought for an agreed price of a specific chattel sold with a warranty, to allow the plaintiff to recover the stipulated sum,

[38] Chinery v. Viall, 5 Hurl. & N. 288, 29 Law J. Exch. 180.

[39] Poulton v. Lattimore, 9 Barn. & C. 259; Day v. Pool, 52 N. Y. 416; Scott v. Raymond, 31 Minn. 437, 18 N. W. 274; Cox v. Long, 69 N. C. 7; Polhemus v. Heiman, 45 Cal. 573.

[40] Street v. Blay, 2 Barn. & Adol. 456; Parson v. Sexton, 4 C. B. 899; Poulton v. Lattimore, 9 Barn. & C. 259; Withers v. Green, 9 How. 213; Lyon v. Bertram, 20 How. 149, 154; Bradley v. Rea, 14 Allen, 20; Dailey v. Green, 15 Pa. St. 118, 126; Dayton v. Hooglund, 39 Ohio St. 671; Doane v. Dunham, 65 Ill. 512, 79 Ill. 131; Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598; Morehouse v. Comstock, 42 Wis. 626; Polhemus v. Heiman, 45 Cal. 573; Breen v. Moran, 51 Minn. 525, 53 N. W. 755; Central Trust Co. v. Arctic Ice Mach. Manuf'g Co., 77 Md. 202, 26 Atl. 493.

[41] 8 Mees. & W. 858.

leaving the defendant to a cross action for breach of the warranty; in which action as well the difference between the price contracted for and the real value of the articles as any consequential damage might have been recovered. * * * The performance of the warranty not being a condition precedent to the payment of the price, the defendant who received the chattel warranted has thereby the property vested in him indefeasibly, and is incapable of returning it back. He has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. * * * But, after the case of Basten v. Butter,[42] a different practice began to prevail, and, being attended with much practical convenience, has since been generally followed; and the defendant is now permitted to show that the chattels, by reason of the noncompliance with the warranty, were diminished in value. * * * The rule is that it is competent for the defendant, not to set off by a procedure in the nature of a cross action the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in an other action to that extent, but no more."

This case also determined that the buyer must bring a cross action if he desired to claim consequential or special damages; but, under the changed procedure now generally prevailing, the buyer may recover such damages by way of counterclaim.[43] And to-day in most states such damages may be set up by way of defense or counterclaim in an action on a note given for the price.[44]

Measure of Damages.

Prima facie the measure of damages, in case of a breach of warranty, is the difference between the value of the goods as they in

[42] 7 East, 479.

[43] See Zabriskie v. Central Vt. R. Co., 131 N. Y. 72, 29 N. E. 1006.

[44] Withers v. Greene, 9 How. 213; Ruff v. Jarrett, 94 Ill. 475; Wentworth v. Dows, 117 Mass. 14, per Colt, J.; Wright v. Davenport, 44 Tex. 164.

fact were and the value of the goods as it would have been if they had been as warranted.[45] This is because, in ordinary cases, the difference is the loss which results directly from the breach of warranty. But the buyer may recover whatever other losses directly result from the breach.[46] Thus where the seller warranted seed as of a particular description, and delivered inferior seed, he was held liable for the loss of crop which thereby resulted to the buyer;[47] and, where the buyer resold, the seller was held liable for the loss of crop which resulted to the subpurchaser, and for which the buyer, having resold with a warranty, was liable to the subpurchaser.[48]

[45] Jones v. Just, L. R. 3 Q. B. 197; Dingle v. Hare, 7 C. B. (N. S.) 145, 29 Law J. C. P. 144; Reggio v. Braggiotti, 7 Cush. 166; Case v. Stevens, 137 Mass. 551; Thoms v. Dingley, 70 Me. 100; Rutan v. Ludlam, 29 N. J. Law, 398; Freyman v. Knecht, 78 Pa. St. 141; Porter v. Pool, 62 Ga. 238; Herring v. Skaggs, 62 Ala. 180; Ferguson v. Hosier, 58 Ind. 438; Case Threshing Mach. Co. v. Haven, 65 Iowa, 359, 21 N. W. 677; Aultman & Taylor Co. v. Hetherington, 42 Wis. 622; Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88; Merrick v. Wiltse, 37 Minn. 41, 33 N. W. 3; Wheeler & W. Manuf'g Co. v. Thompson, 33 Kan. 491, 6 Pac. 902. Under Civ. Code Cal. § 3313, the damages for breach of warranty of the quality of fruit trees is the difference in the value between the kind of trees warranted and the trees actually delivered, at the time those delivered first bore fruit. This value may be shown by the difference between the value of the land occupied by the trees at the time the breach is discovered, and the value such land would have had if the trees had been of the kind warranted. Shearer v. Park Nursery Co., 103 Cal. 415, 37 Pac. 412.

[46] Measure of damages for breach of warranty is the difference between the actual value of the defective articles and their value had they been in accordance with the warranties, to which may be added compensation for the trouble and expense incurred, and any other special damages. J. I. Case Plow Works v. Niles & Scott Co. (Wis.) 63 N. W. 1013. See, also, Suttle v. Hutchinson (Tex. Civ. App.) 31 S. W. 211; Glidden v. Pooler, 50 Ill. App. 36.

[47] Wolcott v. Mount, 38 N. J. Law, 496, affirming 36 N. J. Law, 262; White v. Miller, 71 N. Y. 118, 78 N. Y. 393. See, also, Passenger v. Thorburn, 34 N. Y. 634; Van Wyck v. Allen, 69 N. Y. 61. Contra, Butler v. Moore, 68 Ga. 780. Where a druggist sold Paris green to a planter for the known purpose of killing cotton worms, but the article was not Paris green, and failed to kill the worms on being applied to the buyer's crop, the measure of damages for the breach of the contract, if it resulted in the loss of the crop, was the value of the crop as it stood, with the cost of the article, the expense of applying it, and interest. Jones v. George, 56 Tex. 149, 61 Tex. 345. See, also, Shaw v. Smith, 45 Kan. 334, 25 Pac. 886.

[48] Randall v. Raper, El., Bl. & El. 84, 27 Law J. Q. B. 266.

The rules in respect to special damages which have already been stated are applicable.[49] The question is what a reasonable man, with the knowledge of the parties, would have contemplated as the probable result of a breach of the warranty had he applied his mind to it. "When one sells and warrants a thing for a particular use, upon reasonable ground for believing that, if put to such use, a certain loss to the buyer will be the probable result if the warranty is untrue, * * * the seller is, under the warranty, chargeable with the loss, as one which may reasonably be supposed to have been in the contemplation of the parties when making the contract." [50]

[49] Thoms v. Dingley, 70 Me. 100; Parks v. Morris Axe & Tool Co., 54 N. Y. 568; Thorne v. McVeagh, 75 Ill. 81; Herring v. Skaggs, 62 Ala. 180 (seller not liable for valuables stolen from safe warranted burglar proof); McCormick v. Vanatta, 43 Iowa, 389; Aultman v. Stout, 15 Neb. 356, 19 N. W. 464; English v. Spokane Commission Co., 6 C. C. A. 416, 57 Fed. 451. Buyer reselling with warranty may recover costs of defense against subpurchaser, where seller declines to defend. Lewis v. Peake, 7 Taunt. 153; Hammond v. Bussey, 20 Q. B. Div. 79. Where the seller sold a refrigerator to a poultry dealer with knowledge that he intended to use it to preserve chickens for the May market, and warranted that it would keep them in perfect condition, which it failed to do, and many chickens were lost, the buyer was entitled to recover, in addition to the difference between the value of the refrigerator as constructed and as warranted, the market value of the chickens lost, less expenses of sale. Beeman v. Banta, 118 N. Y. 538, 23 N. E. 887. Where a manufacturer of ice cream bought coloring matter, which the seller, knowing its purpose, represented to be pure and harmless, but which in fact was poisonous, and the buyer's customers who ate ice cream containing the matter were made sick, and the buyer destroyed the ice cream, held, that the buyer could recover the value of the goods so destroyed, and the damage caused by the resulting loss of customers. Swain v. Schieffelin, 134 N. Y. 471, 31 N. E. 1025. The buyer, suing for breach of warranty of a tackle block, cannot recover a sum paid by him without suit, and without communication with the defendant, to a servant for personal injuries caused by the breaking of the block, unless the servant might have recovered from the plaintiff. Roughan v. Boston & L. Block Co., 161 Mass. 24, 36 N. E. 461.

[50] Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88, per Berry, J. See, also, Wilson v. Reedy, 32 Minn. 256, 20 N. W. 153. Where the vendee uses the article, and thereby suffers loss, the measure of damages recoverable for breach of warranty of quality is not the cost of changing it and making it conform to the warranty, but the losses sustained by him, including profits he would have made. Beeman v. Banta, 118 N. Y. 538, 23 N. E. 887.

CHAPTER X.

DAMAGES IN ACTIONS AGAINST CARRIERS.

102–103. Carriers of Goods—Damages for Refusal to Transport.
104. Damages for Loss or Nondelivery.
105. Damages for Injury in Transit.
106–107. Damages for Delay.
108. Consequential Damages.
109. Carriers of Passengers—Damages for Injuries to Passenger.
110. Exemplary Damages and Mental Suffering.
111. Personal Injury.
112. Failure to Carry Passenger—Delay.
113. Failure to Carry to Destination—Wrongful Ejection.

CARRIERS OF GOODS—DAMAGES FOR REFUSAL TO TRANSPORT.

102. The measure of damages for refusal to receive and transport goods is the difference between the value of the goods at the time and place of refusal and what would have been their value at the time and place where they should have been delivered.

103. If other reasonable mode of conveyance can be procured the measure of damages is the increased cost of transportation.

The object of all transportation is to have the use of or an opportunity to sell the goods at the place of destination. The damages for a wrongful refusal to transport goods is, therefore, the value to the shipper of having them at the point of destination. This will ordinarily be the difference between the value of the goods at the time and place of refusal and their value at the place of destination at the time they should have been delivered there.[1] Thus, where a carrier

[1] Pennsylvania R. Co. v. Titusville & P. P. R. Co., 71 Pa. St. 350; Galena & C. U. R. Co. v. Rae, 18 Ill. 488; Harvey v. Railroad Co., 124 Mass. 421; Bridgman v. The Emily, 18 Iowa, 509; Ward's C. & P. L. Co. v. Elkins, 34 Mich. 439; O'Conner v. Forster, 10 Watts, 418; Bracket v. McNair, 14 Johns. 170.

agreed to transport lumber, railroad ties, etc., from Canada to Boston, and failed to do so, the measure of damages was held to be the difference between the market price in Boston and Canada at the time when the defendant should have performed, less the cost of transportation.[2] But damages cannot be recovered for consequences that might have been avoided by the exercise of reasonable diligence on the part of the plaintiff. Therefore, if other means of transportation may be had, and the circumstances are such that a reasonably prudent man would forward the goods by those means, the measure of damages is the increased expense of transportation by such means;[3] and, if such means is no more expensive, and is equally convenient, only nominal damages can be recovered.[4]

SAME—DAMAGES FOR LOSS OR NONDELIVERY.

104. The measure of damages for total loss or nondelivery is the value of the goods at the time and place they should have been delivered.

Obviously, the natural and probable consequences of a failure to deliver the goods at their destination is a loss to the owner, amounting to the value of the goods at that point, and such value is therefore the measure of damages.[5] Ordinarily, value means market

[2] Harvey v. Railroad Co., 124 Mass. 421.

[3] O'Conner v. Forster, 10 Watts, 418; Ogden v. Marshall, 8 N. Y. 340; Grund v. Pendergast, 58 Barb. 216; Higginson v. Weld, 14 Gray, 165; Crouch v. Railway Co., 11 Exch. 742. When a refusal to perform is shown on the part of the carrier, and it is proven that the price of transportation had risen before the time the ship sailed, the plaintiff is entitled to his damages, measured by the rise in the price, without proving that he had the freight ready to ship. Ogden v. Marshall, 8 N. Y. 340. See, also, Nelson v. Elevating Co., 55 N. Y. 480. Cf. Bohn v. Cleaver, 25 La. Ann. 419. Plaintiff cannot recover for damages caused by his failure to properly care for the goods while they were in store awaiting transportation, and before they had been accepted by the carrier. Hamilton v. McPherson, 28 N. Y. 72.

[4] 3 Suth. Dam. § 899.

[5] Rodocanachi v. Milburn, 18 Q. B. Div. 67. Cf. Magnin v. Dinsmore, 56 N. Y. 168, 62 N. Y. 35, and 70 N. Y. 410. See, also, Faulkner v. Hart, 82 N. Y. 413; Spring v. Haskell, 4 Allen, 112; Sangamon & M. R. Co. v. Henry, 14 Ill. 156; Chicago & N. W. Ry. Co. v. Dickinson, 74 Ill. 249; Arthur v. The Cassius,

value, but where goods have no market value their value to the owner may be recovered.[6]

Though the general rule undoubtedly is that the value at the point of destination furnishes the measure of damages, a distinction is made in some jurisdictions in the case of sea voyages. Thus it has been held, in New York, that when a loss to cargo, from leakage or otherwise, occurs in the port where it is laden, and before the voyage begins, the carrier is liable for its value at such port. But when the loss happens after the vessel has left the port of shipment, then the value of the goods at the place of destination, deducting the charges, furnishes the true rule of damages.[7]

In the case of connecting carriers, each carrier is liable only for the value at the terminus of its own route,[8] unless it has expressly or impliedly contracted to carry the goods to their ultimate destination, in which case the value at the latter point furnishes the measure of damages.[9]

The value should be estimated as of the time when the goods should have been delivered.[10]

2 Story, 81, Fed. Cas. No. 564; The Nitn, 36 Fed. 86; South & North Alabama R. Co. v. Wood, 72 Ala. 451; Marquette, H. & O. R. Co. v. Langton, 32 Mich. 251; Dunn v. Railroad Co., 68 Mo. 268; Gray v. Packet Co., 64 Mo. 47; Atkisson v. The Castle Garden, 28 Mo. 124; Sturgess v. Bissell, 46 N. Y. 462; Shaw v. Railroad Co., 5 Rich. Law, 462; Chapman v. Railroad Co., 26 Wis. 295; Whitney v. Railroad Co., 27 Wis. 327; The Joshua Barker, 1 Abb. Adm. 215, Fed. Cas. No. 7,547. But see The Telegraph, 14 Wall. 258; Wheelwright v. Beers, 2 Hall, 391; Jackson v. The Julia Smith, Newb. Adm. 61, Fed. Cas. No. 7,136 (where the invoice price with interest was held to be the measure of damages). For failure to deliver machinery shipped from England to Vancouver's Island, the damages were held to be the cost of replacing the lost machinery in Vancouver's Island, with interest upon the amount until judgment by way of compensation for delay. British Columbia & V. I. Spar, Lumber & Saw-Mill Co. v. Nettleship, L. R. 3 C. P. 499.

[6] Cf. Rodocanachi v. Milburn, 18 Q. B. Div. 67.

[7] Krohn v. Oechs, 48 Barb. 127. See, also, Lakeman v. Grinnell, 5 Bosw. 625; King v. Shepherd, 3 Story, 349, Fed. Cas. No. 7,804.

[8] Louis v. The Buckeye, 1 Handy (Ohio) 150. And see Marshall v. Railroad Co., 45 Barb. 502.

[9] Perkins v. Railroad Co., 47 Me. 573; Erie Ry. Co. v. Lockwood, 28 Ohio St. 358. And see Michigan S. & N. I. R. Co. v. Caster, 13 Ind. 164.

[10] Smith v. Griffith, 3 Hill, 333; Kent v. Railroad Co., 22 Barb. 278.

A misdelivery is equivalent to a nondelivery, and the measure of damages is the same.[11] If the goods are ultimately received by the owner, the damages will be reduced by the value of the goods received, less the expense of recovering them, or the damages caused by the delay.[12]

SAME—DAMAGES FOR INJURY IN TRANSIT.

105. The measure of damages for injury to goods in transit is the difference between the value of the goods at the time and place of delivery in their damaged condition and what their value would have been had they been delivered in good order.

Where there is a total failure to deliver the goods, the owner's loss is their real value. It is obvious that if the goods are delivered to the consignee, but in a damaged condition, the actual loss is diminished by an amount equal to the value of the damaged goods received, and the difference between this value and what the value would have been had the goods been delivered uninjured is the measure of damages.[13] Thus, butterine shipped to New Orleans was damaged in transit, through the carrier's negligence. On its arrival its market value in its damaged condition was 7½ cents per pound, at which price it was sold. Had it been in good order, its market value would have been 15 or 16 cents a pound. It was held that plaintiff was entitled to the difference with interest.[14]

[11] Sedg. Dam. § 853; Forbes v. Railroad Co., 133 Mass. 154; Baltimore & O. R. Co. v. Pumphrey, 59 Md. 390.

[12] Chicago & N. W. Ry. Co. v. Stanbro, 87 Ill. 195; Rosenfield v. Express Co., 1 Woods, 131, Fed. Cas. No. 12,060; Jellett v. Railroad Co., 30 Minn. 265, 15 N. W. 237.

[13] Notara v. Henderson, L. R. 7 Q. B. 225; Chicago, B. & Q. R. Co. v. Hale, 83 Ill. 360; Brown v. Steamship Co., 147 Mass. 58, 16 N. E. 717; Louisville & N. R. Co. v. Mason, 11 Lea, 116; Magdeburg General Ins. Co. v. Paulson, 29 Fed. 530; The Mangalore, 23 Fed. 463. See Morrison v. Steamship Co., 36 Fed. 569, 571; The Compta, 5 Sawy. 137, Fed. Cas. No. 3,070. Bowman v. Teall, 23 Wend. 306; Hackett v. Railroad Co., 35 N. H. 390. Carrier is not entitled to benefit of insurance held by shipper. Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566; Merrick v. Brainard, 38 Barb. 574.

[14] Western Manuf'g Co. v. The Guiding Star, 37 Fed. 611.

The rule applies even where there has been both delay and damage to the goods, though during the delay there has been an advance in the market price, by reason of which the goods in their damaged condition are worth as much as if they had arrived sound and on time. In such a case it was held that the owner was entitled to recover the difference between the market price on the day of delayed delivery, and the price for which the damaged goods sold.[15] The carrier cannot escape liability by reason of the advance in price between the dates of required and actual delivery.

SAME—DAMAGES FOR DELAY.

106. The measure of damages for delay is the difference between the value of the goods at the time and place fixed for delivery and their value at the time and place of actual delivery.

107. Where the value of the goods is not diminished by the delay, the measure of damages is the value of their use during the period of delay.

The first rule is well illustrated by a leading English case.[16] A cap manufacturer delivered to a carrier cloth bought to make up into caps to be carried to M. Owing to an unreasonable delay in delivery, the cloth was received too late for use that season. The carrier knew nothing with reference to plaintiff's business or intentions. It was held that the measure of damages for the delay was not the profits plaintiff might have made, but the diminution in value of the goods owing to the time for finding customers having passed.[17]

[15] Morrison v. Steamship Co., 36 Fed. 569. See, also, The Compta, 5 Sawy. 137, Fed. Cas. No. 3,070; Gibbs v. Gildersleeve, 26 U. C. Q. B. 471.

[16] Wilson v. Railway Co., 9 C. B. (N. S.) 632.

[17] See, also, Cutting v. Railway Co., 13 Allen, 381; Weston v. Railway Co., 54 Me. 376; Sherman v. Railroad Co., 64 N. Y. 254; Ward v. Railroad Co., 47 N. Y. 29; Scott v. Steamship Co., 106 Mass. 468; Collard v. Railway Co., 7 Hurl. & N. 79; Ayres v. Railway Co., 75 Wis. 215, 43 N. W. 1122; Ingledew v. Railroad Co., 7 Gray, 86. Cf. The Parana, 1 Prob. Div. 452. And see same case, reversed, 36 Law T. (N. S.) 388. Money spent looking for goods may be recovered. Hales v. Railway Co., 4 Best & S. 66. Cf. Woodger v. Rail-

The second rule is illustrated by an action for delay in forwarding money. The measure of damages was held to be interest on the money during the period of delay.[18] So in an action for delay in delivering machinery, the measure of damages was said to be the value of the use of the machinery, or the sum for which plaintiff might have hired like machinery.[19]

SAME—CONSEQUENTIAL DAMAGES.

108. Consequential damages arising from a carrier's default may be recovered provided they are natural and probable consequences of the breach of duty.

In the case of all of the rules heretofore stated with reference to the measure of damages, the damages allowed have been for losses directly caused by the carrier's breach of duty. But consequential or indirect damages arising from such breaches of duty may also be recovered, provided they are natural and probable consequences. The following rules may be stated: Damages beyond the difference in market values will not be allowed unless the consequences of a default are communicated to or known by the company at the time and place of delivery to them. Only such losses can be recovered as were reasonably contemplated by both parties at the

way Co., L. R. 2 C. B. 318. Where goods have been resold and the carrier notified of the price, such price is to be taken as their true value, Deming v. Railroad Co., 48 N. H. 455, 470; but where the carrier is not notified of such price, the market price is considered their true value, Horne v. Midland Ry. Co., L. R. 8 C. P. 131. Cf. Illinois Cent. R. Co. v. Cobb, 64 Ill. 128, where shipper was allowed to recover on basis of contract price. Where goods have been sold "to arrive," and the market value at the time when they should have arrived was greater than the contract price, recovery has been allowed on the basis of market value. Rodocanachi v. Milburn, L. R. 18 Q. B. Div. 67. Interest should be allowed. Dunn v. Railroad Co., 68 Mo. 268; Houston & T. C. Ry. Co. v. Jackson, 62 Tex. 209; Newell v. Smith, 49 Vt. 255. Damage for shrinkage in weight of live stock may be recovered. Illinois Cent. R. Co. v. Owens, 53 Ill. 391; Sturgeon v. Railroad Co., 65 Mo. 569. It has been held that the rule does not apply to delay in transportation by sea. The Parana, 1 Prob. Div. 452, 2 Prob. Div. 118. See criticism of this case in Sedg. Dam. § 855.

[18] U. S. Exp. Co. v. Haines, 67 Ill. 137.

[19] Priestly v. Railroad Co., 26 Ill. 206.

time the contract for carriage was made as likely to arise from a breach, and not losses arising out of circumstances then wholly unknown to the carrier. Damages will be given only for the reasonable and proximate, and not for the remote, consequences of the breach of duty.[20]

Illustrations.

In actions for failure or refusal to transport, losses on subcontracts may be recovered, provided the carrier had notice of such contracts;[21] otherwise not.[22] Where the carrier knows that the material is needed in carrying on work by the plaintiff, "the natural consequences of delay and stoppage of work, and payment of wages and expenses arising therefrom, and the loss from not having the work finished at the time it otherwise would have been," may be recovered; but the increased expense of labor in doing the work is too remote.[23]

In actions for loss or nondelivery of goods, the reasonable expense of searching for them may be recovered;[24] but damages for delay in completing a house, caused by the loss of a set of plans of which the defendant had no notice, is too remote.[25]

109. CARRIERS OF PASSENGERS—DAMAGES FOR INJURIES TO PASSENGER.

"The obligations or responsibilities of public carriers do not arise altogether or mainly out of contracts; they are principally imposed

[20] Vicksburg & M. R. Co. v. Ragsdale, 46 Miss. 458; Hadley v. Baxendale, 9 Exch. 341; Gee v. Railway Co., 6 Hurl. & N. 211. As to sufficiency of notice of special circumstances, see Horne v. Railway Co., L. R. 8 C. P. 131, affirming L. R. 7 C. P. 583.

[21] Cobb v. Railroad Co., 38 Iowa, 601, 630.

[22] Harvey v. Railroad Co., 124 Mass. 421.

[23] Pennsylvania R. Co. v. Titusville & P. P. R. Co., 71 Pa. St. 350.

[24] Hales v. Railway Co., 4 Best & S. 66; Farwell v. Davis, 66 Barb. 73; North Missouri R. Co. v. Akers, 4 Kan. 453; Davis v. Railroad Co., 1 Disn. 23. Contra, Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 671.

[25] Mather v. Express Co., 138 Mass. 55. Consequential damages for delay, see Black v. Baxendale, 1 Exch. 410; Vicksburg & M. R. Co. v. Ragsdale, 46 Miss. 458; Favor v. Philbrick, 5 N. H. 358; Horne v. Railway Co., L. R. 7 C. P. 583; Wilson v. Railway Co., 18 Eng. Law & Eq. 557; Grindle v. Eastern Exp. Co., 67 Me. 317; Gibbs v. Gildersleeve, 26 U. C. Q. B. 471.

by law. The refusal to undertake the conveyance of a passenger without excuse, or when actionable, is merely a violation of a carrier's duty. He has refused to contract. So his duty to carry with care, though it may to some extent be regulated and restricted by contract, is imposed by law, and cannot, as is generally held, be contracted away. Hence actions against these carriers are generally in tort for negligence, or for misconduct involving a breach of duty. Contracts, however, are usually made fixing the extent of the route, the mode of conveyance, the kind of accommodations, the time, etc.; and, therefore, actions founded upon such contracts may be maintained. Whether the action be upon the breach of duty or for violation of contract, to the extent that they involve the same acts and omissions, the damages as measured by law are substantially the same."[26] The consequences in this class of cases fall directly upon the person, and in most cases are not distinguishable from those of a tort. In either tort or contract the damages are measured by the probable or natural consequences of the wrong, but the natural and probable consequences of a breach of contract must be determined with regard to all the facts known to the parties at the time the contract was made. Thus in Hobbs v. Railway Co.[27] it appeared that plaintiff, with his wife and children, were set down at the wrong station, and, being unable to get a conveyance, they were obliged to walk, the wife catching a severe cold. It was held that there could be no recovery for the expense of the illness, because it was not within the contemplation of the parties, nor a probable consequence of having to walk home. The action was on the contract. The authority of this decision was much shaken by the opinions of Bramwell and Brett, L. J., in McMahon v. Field,[28] and has been practically neutralized in most states by holding that it does not apply where the action sounds in tort; and cases of this character have been almost always treated as sounding in tort.[29] Thus, in an action for

[26] 3 Suth. Dam. § 934.

[27] 10 Q. B. 111.

[28] 7 Q. B. Div. 591.

[29] Alabama G. S. R. Co. v. Heddleston, 82 Ala. 218, 3 South. 53; Baltimore C. P. Ry. Co. v. Kemp, 61 Md. 74, 619; Heirn v. McCaughan, 32 Miss. 17; Yorton v. Railway Co., 62 Wis. 367, 21 N. W. 516, and 23 N. W. 401. It has been fully followed in some jurisdictions. Pullman Palace Car Co. v. Barker, 4 Colo. 344; Murdock v. Railroad Co., 133 Mass. 15. It has been said, where

neglect to transport a passenger across the Isthmus of Panama according to contract, the plaintiff was allowed to recover the expense of a subsequent illness caused by being left in that unhealthy country.[30] Brown v. Railway Co.[31] was a case very similar to the Hobbs Case. In an elaborate opinion the court reached a conclusion directly opposite to that reached in the Hobbs Case. Mr. Sedgwick has admirably stated the pith of the whole matter as follows: "Upon the whole, these cases seem to illustrate very strongly a point upon which too much insistence cannot be laid,—that the case of Hadley v. Baxendale introduced no new rule of damages. For proximate and natural consequences of the defendant's act, whether it be a breach of contract or of tort, a recovery can always be had. The only meaning of the rule with regard to the contemplation of the parties is that in contract a particular species of proof as to special consequences is often available, which is not so in tort." [32]

110. SAME—EXEMPLARY DAMAGES AND MENTAL SUFFERING.

There is another light in which the form of action becomes important. Where the action is upon the contract, exemplary damages cannot be recovered;[33] but where the action is for a tort, founded on a breach of the public duty, exemplary damages may be given in proper cases.[34] So, also, it is usually held that dam

the breach of contract was not also a tort, the rule in Hobb's Case will apply. 2 Sedg. Dam. § 868; Cincinnati, H. & I. R. Co. v. Eaton, 94 Ind. 474; Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911. No such case has been found. A passenger may declare for a breach of contract, where there is one, but it is at his election to proceed as for a tort where there has been personal injury suffered by the negligence or wrongful act of the carrier, or the agents of the company; and in such action the plaintiff is entitled to recover according to the principles pertaining to that class of actions, as distinguished from actions on contract. Baltimore City Pass. Ry. Co v. Kemp, 61 Md. 619.

[30] Williams v. Vanderbilt, 28 N. Y. 217.

[31] 54 Wis. 342, 11 N. W. 356, 911.

[32] 2 Sedg. Dam. § 871.

[33] New Orleans, J. & G. N. R. Co. v. Hurst, 36 Miss. 660; Hamlin v. Railway Co., 1 Hurl. & N. 408, 411.

[34] Heirn v. McCaughan, 32 Miss. 17; Thomp. Carr. p. 546, § 5; Id. p. 573, § 27.

ages for mental suffering cannot be recovered in an action on a contract,[35] though the rule is far from being settled, and is denied by many courts of ability.[36]

111. SAME—PERSONAL INJURY.

In actions for personal injury to a passenger the measure of damages is usually the same as in ordinary cases of personal injury. Compensatory damages for pain, mental and physical, and for loss of time, medical expenses, diminution of earning power, and the like, may always be recovered.[37] Damages cannot be recovered for mere fright, but, when a nervous shock naturally results in physical injury, damages may be recovered therefor.[38]

112. SAME—FAILURE TO CARRY PASSENGER—DELAY.

Damages for failure to transport a passenger include compensation for the increase of cost of carriage by another conveyance, the loss of time, and other ordinary expenses of delay.[39] Plaintiff can incur only reasonable expense in avoiding the consequences of the delay.[40] Whether or not plaintiff would have adopted the course he should have adopted if the delay had occurred through his own fault, and he had not the carrier to look to for compensation, has been suggested as a test of reasonableness.[41] Substantially the same principles are applicable in actions for delay.

35 Walsh v. Railway Co., 42 Wis. 23.

36 See able note by H. Campbell Black in 11 C. C. A. 556. Also able note by William L. Clark, Jr., in 15 C. C. A. 235. See, also, ante, p. 102.

37 Sedg. Dam. § 860. See, also, Id. § 481 et seq.

38 Bell v. Railway Co., 26 L. R. Ir. 428; Victorian Ry. Com'rs v. Coultas, L. R. 13 App. Cas. 222.

39 Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052; Eddy v. Harris, 78 Tex. 661, 15 S. W. 107; Porter v. The New England, 17 Mo. 290; The Zenobia, 1 Abb. Adm. 80, Fed. Cas. No. 18,209; Williams v. Vanderbilt, 28 N. Y. 217.

40 Sedg. Dam. § 862.

41 Le Blanche v. Railway Co., 1 C. P. Div. 286.

113. SAME—FAILURE TO CARRY TO DESTINATION—WRONGFUL EJECTION.

Where a carrier fails to carry a passenger to his destination, and sets him down at some intermediate point, compensation may be recovered for all the expenses of delay,[42] including loss of time[43] and cost of a reasonable conveyance to his destination.[44] He may also recover compensation for the indignity of the expulsion from the train, and, if there are aggravating circumstances, he may recover exemplary damages.[45] Where, by the fault of the carrier's agents, and without the passenger's fault, the ticket of the passenger is not such a one as he should have to entitle him to passage, the carrier will be liable in damages for expelling him.[46] It is an interesting question to determine the true measure of damages in such a case. What are the natural and probable consequences of such a wrong? This must be answered with a view to the nature of the wrong and the time it was committed. It has been contended that the only natural and legitimate result of selling plaintiff a wrong ticket, or depriving him of a proper one, is to compel him to pay his fare a second time; and that he commits a breach of social duty in failing to protect himself thus, at trifling expense,

[42] Chicago & A. R. Co. v. Flagg, 43 Ill. 364; Pennsylvania R. Co. v. Connell, 127 Ill. 419, 20 N. E. 89; carrying beyond, Trigg v. Railway Co., 74 Mo. 147.

[43] Hamilton v. Railroad Co., 53 N. Y. 25.

[44] Indianapolis, B. & W. Ry. Co. v. Birney, 71 Ill. 391; Pennsylvania R. Co. v. Connell, 127 Ill. 419, 20 N. E. 89; Francis v. Transfer Co., 5 Mo. App. 7; Hamilton v. Railroad Co., 53 N. Y. 25.

[45] Hanson v. Railway Co., 62 Me. 84; Yates v. Railroad Co., 67 N. Y. 100. See, also, cases cited infra, notes 51, 52.

[46] Lake Erie & W. R. Co. v. Fix, 88 Ind. 381; Kansas City, M. & B. R. Co. v. Riley, 68 Miss. 765, 9 South. 443; MacKay v. Railroad Co., 34 W. Va. 65, 11 S. E. 737; Murdock v. Railroad Co., 137 Mass. 293; Hufford v. Railroad Co., 64 Mich. 631, 31 N. W. 544; Id., 53 Mich. 118, 18 N. W. 580; Yorton v. Railroad Co., 54 Wis. 234, 11 N. W. 482; Id., 62 Wis. 367, 21 N. W. 516. But if by mutual mistake, or by fault of the passenger, his ticket is one which does not entitle him to passage, he may properly be ejected, even though he may have a right of action against the carrier for selling him an improper ticket. Yorton v. Railway Co., 54 Wis. 234, 11 N. W. 482; Id., 62 Wis. 367, 21 N. W. 516; Bradshaw v. Railroad Co., 135 Mass. 407; Frederick v. Railroad Co., 37 Mich. 342.

from the consequences of the fault or mistake of the carrier's servant.[47] If he does so, the amount paid, with interest, furnishes the measure of damages. But we apprehend that he is not compelled to do so. He may elect to leave the train, and in that case may recover not only the amount of the additional fare which he is subsequently obliged to pay in order to reach his destination, but all damages sustained by him as a direct and natural consequence of the ejection.[48] The reason for this is that the rule of avoidable consequences does not require one to anticipate a wrong, and to take steps to avoid its consequences, before it is committed. He is entitled to presume that no wrong will be committed. The rule merely requires one who has been already injured to use all reasonable means to make the loss as light as possible. Whether it is a passenger's duty, therefore, to pay his fare a second time, and thus avoid ejection, depends upon when the wrong or breach of duty is committed. This is clearly at the time the ejection takes place. Where the action is for the breach of the contract or duty to carry, this is obviously true. But it is equally true where the action is founded on the neglect or mistake of the carrier's servant in regard to the passenger's ticket. In such case the wrong is not committed until the neglect has resulted in damage; that is to say, until the passenger has been expelled from the train. Negligence without damage is not a wrong.

As between the passenger and the conductor who ejects him the ticket is conclusive evidence as to the passenger's right of passage.[49] If the passenger has not a proper ticket, the conductor may eject him,[50] and, though the carrier is liable for such ejection because it is a natural and probable consequence of the negligence

[47] Yorton v. Railway Co., 62 Wis. 367, 21 N. W. 516; 2 Sedg. Dam. § 865.

[48] Yorton v. Railway Co., 62 Wis. 367, 371, 21 N. W. 516.

[49] Hale, Bailm. p. 510.

[50] "If a passenger pay a railroad agent fare for a certain trip, and by mistake of the agent is given a ticket not answering for that trip, but one in an opposite direction, and the conductor refuses to recognize such ticket, and demands fare, which the passenger fails to pay, ejection of the passenger from the train without unnecessary force will not be ground of action against the company as for a tort; but the action may and must be based on the breach of contract to convey the passenger." MacKay v. Railroad Co., 34 W. Va. 65, 11 S. E. 737.

of a prior servant in not furnishing the passenger with a proper ticket, he is not liable for exemplary damages, where the conductor acts considerately in making the ejection.[51] It is generally held, however, that a passenger may recover compensatory damages for mental suffering arising from the indignity of being expelled from a train, even though the conductor acted considerately.[52]

[51] Fitzgerald v. Railroad Co., 50 Iowa, 79; Philadelphia, W. & B. R. Co. v. Hoeflich, 62 Md. 300; Logan v. Railroad Co., 77 Mo. 663; Hamilton v. Railroad Co., 53 N. Y. 25; Yates v. Railroad Co., 67 N. Y. 100; Tomlinson v. Railroad Co., 107 N. C. 327, 12 S. E. 138.

[52] Chicago & A. R. Co. v. Flagg, 43 Ill. 364; Chicago & N. W. Ry. Co. v. Williams, 55 Ill. 185; Chicago & N. W. Ry. Co. v. Chisholm, 79 Ill. 584; Pennsylvania R. Co. v. Connell, 112 Ill. 295; Lake Erie & W. Ry. Co. v. Fix, 88 Ind. 381; Shepard v. Railway Co., 77 Iowa, 54, 41 N. W. 564; Carsten v. Railroad Co., 44 Minn. 454, 47 N. W. 49; Hamilton v. Railroad Co., 53 N. Y. 25; Stutz v. Railroad Co., 73 Wis. 147, 40 N. W. 653; 2 Sedg. Dam. § 865. It has been held that, where the conductor acts considerately, the plaintiff should have felt no sense of insult, and therefore cannot recover damages for the indignity. Paine v. Railroad Co., 45 Iowa, 569; Fitzgerald v. Railroad Co., 50 Iowa, 79; Batterson v. Railway Co., 49 Mich. 184, 13 N. W. 508. Such is not the general rule.

CHAPTER XI.

DAMAGES IN ACTIONS AGAINST TELEGRAPH COMPANIES.

114. Public Nature.
115. Action by Sender.
116. Action by Receiver.
117–118. Compensatory Damages.
119. Proximate and Certain Damages.
120. Remote and Speculative Damages.
121. Damages not within Contemplation of Parties—Notice of Purpose and Importance of Message.
122. Messages not Understood—Cipher Messages.
123. Avoidable Consequences.
124. Exemplary Damages.

PUBLIC NATURE.

114. Telegraph companies exercise a public calling, and are bound to accept and carefully transmit all messages offered.

In some respects the liabilities of telegraph companies resemble those of a common carrier. It is their duty to accept and transmit messages for all who offer to contract with them for that purpose.[1] It is their duty to enter into such contracts. Accordingly, an action for failure to transmit a message may be regarded either as a breach of contract, or as a breach of the public duty, i. e. a tort. In practice, especially under the reformed codes of procedure, it is extremely difficult to say whether the action sounds in contract or tort. Formerly it was held, in many cases, that telegraph companies, as common carriers of intelligence, were subject to the same absolute liability as exists in the case of common carriers of goods; but there is an essential difference in regard to the subject-matter

[1] "The business of telegraph companies, like that of common carriers, is in the nature of a public employment, as they hold out to the public that they are ready and willing to transmit intelligence for any one upon the payment of their charges, and not for particular persons only." De Rutte v. Telegraph Co., 1 Daly, 547.

of the respective contracts.[2] Common carriers actually transport chattels. Telegraph companies really transport nothing. It is a metaphor to say that they carry intelligence. Accordingly, it is now settled that telegraph companies are not common carriers. They are liable only for negligence. Like common carriers, telegraph companies may limit their liability by reasonable regulations brought home to the contracting party.[3]

ACTION BY SENDER.

115. The sender of a message may maintain an action against the company for failure to transmit, or mistake or delay in transmitting, a message.

Such actions are usually actions of contract, and the ordinary rules as to the measure of damages in actions for breach of contract apply. Every breach of contract is an actionable injury, and for every actionable injury there is an absolute right to damages. If no actual damage can be shown, the party injured may recover nominal damages only; but to this much he is entitled absolutely.[4] He is entitled to nominal damages even though the breach of contract may in fact have been beneficial to him. In Hibbard v. Telegraph

[2] Common carriers are held to the responsibility of insurers for the safe delivery of the property intrusted to their care upon grounds of public policy, to prevent fraud or collusion with thieves, and because the owner, having surrendered up the possession of his property, is generally unable to show how it was lost or injured. These reasons do not apply to telegraph companies, and they are not held to the responsibility of insurers for the correct transmission and delivery of intelligence. As the value of their service, however, consists in the message being correctly and diligently transmitted, they necessarily engage to do so; and if there is an unreasonable delay, or an error committed, it is presumed to have originated from their negligence, unless they show that it occurred from causes for which they are not answerable. De Rutte v. Telegraph Co., 1 Daly, 547.

[3] They may qualify their liability to the effect that they will not be answerable for errors unless a message is repeated, but this condition must be brought home to the knowledge of the person who brings the message for transmission. De Rutte v. Telegraph Co., 1 Daly, 547.

[4] First Nat. Bank of Barnesville v. W. U. Tel. Co., 30 Ohio St. 555.

Co.[5] a telegraph company had failed to deliver a telegram directing the purchase of certain goods, and the sender escaped a loss which he would have sustained had the message been delivered and the goods bought. It was held that he could recover nominal damages, for the company had broken its contract.

ACTION BY RECEIVER.

116. An action may be maintained by the receiver of a message for damages caused by the company's default in its transmission.

A telegraph company is liable to the receiver of a message for damages caused by their default in its transmission. This liability is rested sometimes on contract and sometimes on tort. It does not necessarily follow that the contract is made with the person by whom or in whose name a message is sent. He may have no interest in the subject-matter of the message, but the party to whom it is addressed may be the only one interested in its correct or diligent transmission; and where that is the case, he is the one with whom the contract is made.[6] In this respect, actions against telegraph companies are analogous to actions against common carriers. Whether the action against the carrier is to be brought by the consignor or the consignee depends, as a general rule, upon which one the legal right to the property is vested in. If it is vested in the consignee, the consignor, in making the contract with the carrier, is regarded as having acted as the agent of the consignee.[7] Where the action by the consignee is regarded as sounding in tort, the liability is based upon breach of the public duty imposed on telegraph companies to transmit messages. "Every contract made by a telegraph company is made in pursuance of a duty imposed upon it by the state, and any breach of it is not only a breach of contract, but a tort; for the duty assumed involves the performance of this contract, not merely as it affects the sending, but as it affects the delivering. The telegraph company is under a duty to all

[5] 33 Wis. 558.
[6] De Rutte v. Telegraph Co., 1 Daly, 547.
[7] Hale, Bailm. 543.

the world, and breach of its contract with the sender is a breach of this duty, as it affects the receiver." [8] There is negligent or willful conduct resulting in damage, and this, as has been seen, attaches liability.

COMPENSATORY DAMAGES.

117. Compensation may be recovered for all losses which are the natural and probable consequence of a default in the transmission of messages.

118. What are natural and probable consequences must be determined with reference to the facts contemplated by the parties.

Distinction between Tort and Breach of Contract Immaterial.

It is not necessary, where there is no question as to punitive or exemplary damages, to distinguish cases in which the action is one for breach of the contract to transmit and deliver the message from cases in which the action is on the case for the tort in failing to perform the duty devolved on the telegraph company under the contract. "The substance and nature of the default and the consequent injury are the same in either view, and, in the absence of circumstances warranting the imposition of punitory damages, the measure of damages must be the same, whatever be the form of the action." [9]

Damages for Natural and Contemplated Consequences Only.

The liability of telegraph companies is determined under the rules laid down in Hadley v. Baxendale.[10] Where the company has no notice of the nature of the transaction, either from the message itself, or from information given it at the time of sending the message, the only damages recoverable are the cost of the message.[11] There is much difficulty in applying the rule of contemplated consequences, owing to the peculiar nature of the contract. Perhaps as often as otherwise the telegraph company knows nothing of the

[8] Sedg. Dam. 878.

[9] W. U. Tel. Co. v. Rogers, 68 Miss. 748, 9 South. 823.

[10] 9 Exch. 341.

[11] Beaupré v. Telegraph Co., 21 Minn. 155.

object of the contract or the probable consequences of a breach. Many messages are written in cipher. Some messages disclose more than others. For instance, a message may show, on its face, that it relates to a purchase or sale of goods; but it may give no notice that the purchase or sale was made with reference to a subcontract, while another message might disclose the fact of a subcontract. In one case, therefore, damages for loss on the subcontract might be recovered, while in the other it could not. "The telegraph company usually derives its only knowledge of the object to be effected from the message itself, and hence in some cases is in absolute ignorance, in others has complete knowledge, and in still others can only surmise what the object is, or what the loss in consequence of any mistake or negligence in transmission will be." [12] In this class of cases, therefore, the principal contest is usually as to how far the company can be charged with knowledge of the object of the message. Each case, therefore, must be decided largely upon its own facts.

SAME—PROXIMATE AND CERTAIN DAMAGES.

119. Damages may be recovered for losses sustained or gains prevented where they are the proximate and certain result of defendant's fault.

EXCEPTION—Damages cannot be recovered for loss of unlawful contract or gain.

Losses Sustained or Gains Prevented.

Whenever it can be shown that, by reason of a telegraph company's inexcusable failure to send or to deliver a telegram, or of an error in its transmission, the sender has failed to make some gain or profit which he would otherwise have made, or has sustained some loss which he would not otherwise have sustained, and the amount thereof can be shown with certainty, the gain or profit prevented or loss sustained is a proper element of damages in an action against the company for its breach of contract. This, of course, is subject to the qualification laid down in Hadley v. Baxendale, that

[12] Sedgw. Dam. § 875.

such damage must have arisen naturally from the company's breach of contract itself, or must have been in the contemplation of the parties when they made the contract as a probable result of a breach thereof.

Same—Illustrations—Losses Sustained.

The following illustrations show the application of the rule where losses have been sustained:

In W. U. Tel. Co. v. Landis [13] plaintiffs' agent had delivered to defendant, for transmission to them, a message that he had bought two car loads of sheep at $5.60 per hundred. In the course of transmission, the word "sixty" in the message was changed to "six." Plaintiffs, relying on the message, sold the sheep before arrival at $6 per hundred. It was held that the measure of plaintiffs' damages was the difference between the amount the sheep were sold for and their actual value.

In Doughtery v. Telegraph Co.[14] it was held that, for failure to deliver a message directing the sale of cotton owned by the sender, he may recover the actual damages sustained by a fall in the price of the cotton between the time it would have been sold if the message had been delivered and the time it was actually sold, reasonable diligence having been used to make the sale.

In W. U. Tel. Co. v. Williford [15] it was held that the measure of damages for failure to deliver a telegram to the owner of cattle from his agent, whereby an opportunity to sell the cattle was lost, is the difference between their market value at the place where they were at the time and the price for which they could have been sold.

In W. U. Tel. Co. v. Linney [16] it was held that a telegraph company is liable to the addressee of a telegram, on failure to deliver within a reasonable time a telegram notifying him not to ship cattle to a certain market, for loss caused by a shipment to such market.

In W. U. Tel. Co. v. Collins [17] it was held that where a telegraph company neglects to deliver a message to a live-stock shipper as to the state of the market at a certain point, in consequence of which

[13] 12 Atl. (Pa. Sup.) 467.
[14] 75 Ala. 168.
[15] 27 S. W. 700 (Tex. Civ. App.).
[16] 28 S. W. 234 (Tex. Civ. App.).
[17] 45 Kan. 88, 25 Pac. 187.

neglect the shipper sends his stock to the next nearest market, at which he receives 10 cents per 100 less than the market price for the same stock at the first point on the same day, the shipper is entitled to recover from the telegraph company the difference between the market prices of the two points, with the difference in freight added.

In W. U. Tel. Co. v. Stevens[18] it was held that where a telegraph company, by negligently failing to deliver a telegram, causes the sender's cattle to be shipped to a point where they have to be sold at less than the market price at the place whence they were shipped, the measure of damages is the difference between such market price and the amount for which they were sold. It was further held that the fact that the sender might have purchased other cattle of the same grade, for a less sum than he received for his, does not affect the question of damages, since it does not devolve on him to replace the cattle lost through the company's negligence.

In Hollis v. Telegraph Co.[19] it was held that the measure of damages which may be recovered from a telegraph company for deviating from the terms of a message correctly reporting the state of the market for a particular article, whereby the receiver of the message is induced to send the article forward for sale, is the difference between the actual state of the market and the terms of the message, as erroneously transmitted, overstating it, provided the actual loss amounts to that much.

In W. U. Tel. Co. v. James[20] it was held that where the injury done one to whom a telegram was sent, by failure to deliver it, was the prevention of a sale that would otherwise have been consummated, the measure of damages is the price which would have been realized by the sale less the market value of the goods on that day, or, if they had no market value, the contract price less the price that could have been obtained afterwards.

In Garrett v. Telegraph Co.[21] it appeared that plaintiff had an arrangement with a Chicago firm to inform him by wire of any change in the cattle market. He delivered a message to them to defendant's agent, stating where he could be reached by wire, which

[18] 16 S. W. 1095 (Tex. Sup.).
[19] 91 Ga. 801, 18 S. E. 287.
[20] 90 Ga. 254, 16 S. E. 83.
[21] 58 N. W. 1064 (Iowa).

was not sent. Relying upon the silence of his correspondent, plaintiff purchased cattle for the Chicago market on the basis of the price last named by it, which had fallen. It was held that the measure of damages was the difference between the Chicago price at the time he bought the cattle and what it was when last informed by his correspondent.

In W. U. Tel. Co. v. Haman [22] it appeared that a member of the plaintiff firm, after receiving instructions by telegraph, had purchased a quantity of wool, and delivered to the defendant telegraph company a message advising the firm thereof, telling the agent that the message was important, and that he thought his firm had probably contracted to sell the wool; and, to avoid any mistake, he had the agent transcribe the message, and signed the copy. The message was not delivered, and the price of wool when the firm first learned of the purchase had declined from the price at which they could have sold it if they had gotten the message. They sought to recover the difference as their damages, and it was held that they could do so.

In W. U. Tel. Co. v. Brown [23] plaintiff had contracted to sell in C. certain mules, for the purchase of which his agent had been sent to K.; but, owing to the failure of plaintiff to get a message in due season, his customer rescinded the contract. It was held that the measure of damages for failure to make this sale was not the difference between the price at which they could have been bought in K. if the message had been delivered in due time, and the price at which he had contracted to sell them, but that difference less the expense of transportation to C.

In W. U. Tel. Co. v. Hyer [24] ship brokers in Pensacola, who had been engaged by customers to charter a vessel, sent a telegram to their correspondent in Barbadoes, making an offer for the charter of a vessel. The offer was accepted, and a message to that effect sent to the brokers, but the message was not delivered to them by the telegraph company. Their correspondent in Barbadoes, as their agent, signed a charter party. Not receiving the answer to their message, they told their customer that they had failed to charter the

[22] 2 Tex. Civ. App. 100, 20 S. W. 1133. [23] 84 Tex. 54, 19 S. W. 336.
[24] 22 Fla. 637, 1 South. 129.

vessel, whereupon he chartered another. Two weeks later the vessel chartered by their agent came to Pensacola, and they were obliged to recharter it at a loss. The telegraph company was held liable for such loss, and for the plaintiff's time and exertions in rechartering the vessel.

In Parks v. Telegraph Co.[25] it was held that for failure to deliver a message authorizing the sender's agent to secure a debt due him from a third person by attachment, by reason of which other creditors secured attachments, and the sender lost his debt, the sender could recover from the company the amount of the debt.[26]

In Herron v. Telegraph Co.[27] where plaintiff's sale of his horse had failed because of delay in delivering a telegram, and the horse had no regular market value in the neighborhood, and plaintiff had since disposed of him for the best price by reasonable effort attainable, it was held that the plaintiff could recover the difference between the dispatch's offer and the price realized, with cost of keep and interest.

In Pruett v. Telegraph Co.[28] the plaintiff's agent had telegraphed him that a herd of cattle which plaintiff was holding together for sale had been sold by the agent, and informed the telegraph agent that, unless the message was delivered that day, the plaintiff would turn the herd loose. The telegraph company failed to deliver the telegram that day, and the herd was therefore turned loose. It was held that the company was liable for the cost of regathering the cattle, and the death and depreciation in value of the cattle caused by such regathering.

In W. U. Tel. Co. v. Bates[29] it was held that where plaintiff, through delay in receiving a telegram, made a journey which he would not have made until later if it had been received, he was entitled to recover the increased expenses of the premature journey. He could not recover more than this loss.[30]

[25] 13 Cal. 422.

[26] To the same effect, see Fleischner v. Cable Co., 55 Fed. 738, and W. U. Tel. Co. v. Sheffield, 71 Tex. 570, 10 S. W. 752.

[27] 57 N. W. 696 (Iowa).

[28] 6 Tex. Civ. App. 533, 25 S. W. 794.

[29] 93 Ga. 352, 20 S. E. 639.

[30] See Sprague v. Telegraph Co., 6 Daly, 200, affirmed in 67 N. Y. 590.

In W. U. Tel. Co. v. Proctor [31] it was held that, where a telegram sent by a father to prevent the marriage of a minor daughter was not promptly delivered, by reason of which the marriage was performed, he may recover for loss of service until she reaches the age of 18 years.

In Gulf, C. & S. F. Ry. Co. v. Loonie [32] where it appeared that plaintiff, who was constructing a building, went to C. for materials, leaving the plans with his workmen; that afterwards he telegraphed that the plans be sent to C., but the message was not delivered; that while at C. he agreed on the materials and prices, but could not conclude contracts for the materials, in the absence of the plans; that afterwards the price of the material advanced,—it was held that an instruction that plaintiff's measure of damage was "the amount he paid for the message, the value of plaintiff's time lost, and the difference he had to pay by reason of the advance in the price of material," was properly given.

In W. U. Tel. Co. v. Jobe [33] it was held that where a telegraph company failed to deliver a message to plaintiff, announcing the illness of his wife's father, till 14 hours after receipt, plaintiff can recover the cost of a second message sent him in relation thereto, and paid for by him.

In Rich Grain Distilling Co. v. W. U. Tel. Co.[34] it was held that where a telegram requesting boiler makers to send a man to repair a boiler in a distillery is not delivered, damages are recoverable for money expended in paying idle servants.[35]

Same—Illustrations—Gains Prevented.

The following cases show the application of the rule to cases in which gains or profits are prevented. The rule, of course, is subject

[31] 25 S. W. 811 (Tex. Civ. App.).

[32] 82 Tex. 323, 18 S. W. 221.

[33] 25 S. W. 168 (Tex. Civ. App.).

[34] 13 Ky. Law Rep. 256 (Ky. Super. Ct.).

[35] See, also, Tyler v. Telegraph Co., 60 Ill. 421; W. U. Tel. Co. v. Du Bois, 128 Ill. 248, 21 N. E. 4; W. U. Tel. Co. v. Hobson, 15 Grat. (Va.) 122; Hadley v. Telegraph Co., 115 Ind. 191, 15 N. E. 845; Manville v. Telegraph Co., 37 Iowa, 214; Turner v. Telegraph Co., 41 Iowa, 458; Leonard v. Telegraph Co. 41 N. Y. 544.

to the qualification that the profits or gain must not be speculative. This qualification will be presently illustrated.

In Alexander v. Telegraph Co.[36] it was held that, where the sender of a telegram loses a purchase of land by reason of the company's failure to deliver the telegram, he may recover the difference between the price at which the property was offered to him and its actual market value at the time the message should have been delivered.

In Rittenhouse v. Telegraph Co.[37] the operator made a mistake in the article ordered by telegraph. It was held that the company must make good the difference between the price of the article actually ordered at the time the dispatch should have been delivered, and the price of the same article if it had been purchased as soon as the mistake was discovered.

In United States Tel. Co. v. Wenger[38] there was a failure by the telegraph company to deliver a message to buy certain stock which advanced in price between the time when the message should have been delivered and the time it was purchased under another order. It was held that the company was liable for the amount of the advance in the price of the stock between those dates.[39]

In True v. Telegraph Co.[40] the plaintiffs, having received an offer of a cargo of corn at 90 cents per bushel, had delivered to the telegraph company, to be sent to the person making the offer, the following message: "Ship cargo named at ninety, if you can secure freight at ten." The message was not delivered by the company, and by reason thereof the plaintiffs failed to obtain the corn on the terms offered, and the price of corn and freight immediately advanced, and the plaintiffs lost the profits that they might have made thereon. The court held that the measure of damages was the difference between the price named in the offer and that which plaintiffs would have been obliged to pay at the same place, in order, by due diligence, after notice of failure to deliver their telegram, to purchase

[36] 66 Miss. 161, 5 South. 397.

[37] 44 N. Y. 263.

[38] 55 Pa. St. 262.

[39] And see Pearsall v. Telegraph Co., 124 N. Y. 256, 26 N. E. 534.

[40] 60 Me. 9.

the like quantity and quality of corn, with the same rule in relation to the freight.

In Carver v. Telegraph Co.[41] it was held that where a telegraph company, with notice of the importance of a message directing the purchase of cattle, fails to deliver it, and there is a subsequent permanent advance in the price of cattle, the company will be liable to the sender for the loss sustained by purchase of cattle at the advanced price.

In Pearsall v. Telegraph Co.[42] it was held that the proper measure of damages for failure to deliver a telegraphic message containing on its face an instruction to buy a certain stock, that in consequence was not bought until 24 hours later, was the difference between the market value of the stock when the message ought to have been delivered and on the day after.

In W. U. Tel. Co. v. Fatman[43] a ship broker desired to furnish a vessel for the use of another person, and, if he had done so, he would have been entitled to certain commissions for his services. He dispatched to Liverpool for a vessel, and a message requiring immediate reply, and offering a suitable vessel, was delivered to a telegraph company, to be communicated to the broker; but the company failed to deliver it within a reasonable time, and on that account the vessel was not obtained. The broker sued the company, and recovered judgment for the amount of the commissions he would have earned if he had secured the vessel, and the judgment was affirmed.

In W. U. Tel. Co. v. Valentine[44] it was held that where, by the negligence of a telegraph company, a person fails to obtain a salaried position, the measure of damages is the difference between the amount of such salary and the amount actually earned by him.

In W. U. Tel. Co. v. Bowen[45] it appeared that plaintiffs were threshers, and their agent at V. wired them: "Have 30,000 bushels for you, if you can come at once." Plaintiffs answered: "Will ship machinery at once." The latter message was not delivered, and some of the parties for whom threshing was to be done, not knowing

[41] 31 S. W. 432 (Tex. Civ. App.).
[42] 124 N. Y. 256, 26 N. E. 534 (affirming 44 Hun, 532).
[43] 73 Ga. 285.
[44] 18 Ill. App. 57.
[45] 84 Tex. 476, 19 S. W. 554.

that the offer was accepted, made other contracts. It was held that defendant was liable for the loss of the contracts, though there was no delay in getting the machine to V.

In W. U. Tel. Co. v. Robinson [46] which was an action against a telegraph company to recover for negligence in the transmission of a message, it appeared that plaintiffs held certain contracts for threshing grain, which they lost thereby. It was held that the measure of their damages was the difference between the amount they would have received under the contracts and the expense they would have incurred in fulfilling them.

In W. U. Tel. Co. v. Longwill [47] a telegram had been sent to a physician summoning him, but through the negligence of the company it was not delivered to him until it was too late to make the visit, and until after the order had been countermanded. There was testimony that a reasonable compensation for the services expected to be performed by the physician would have been $500, and the sender of the message was solvent. It was held that the difference between such sum and what he earned during the time that he would have been absent on such visit was the measure of damages.

Same—Loss of Unlawful Contract or Gain.

Even if a telegraph company is negligent in failing to send or deliver a message, the sender cannot recover for gains prevented thereby, if they would have been unlawful. The law clearly cannot take such matters into consideration in compensating him. He could not recover, for instance, damages for being prevented from entering into or carrying out an unlawful contract. Thus, in a Georgia case it was held that since contracts for fictitious or option "futures" are illegal, whether between principal and principal, or broker and principal, where both parties are in complicity touching the unlawful purpose, such contracts, or the loss or gain resulting from them, cannot be invoked to measure the damages sustained by the sender of a telegram in consequence of a mistake made by the company in transmitting the message.[48]

[46] 29 S. W. 71 (Tex. Civ. App.).

[47] 21 Pac. 339 (N. M.).

[48] Cothran v. Telegraph Co., 83 Ga. 25, 9 S. E. 836. See, also, Melchert v. Telegraph Co., 11 Fed. 193; Freeman v. Telegraph Co., 93 Ga. 230, 18 S. E. 647 (referred to infra).

SAME—REMOTE AND SPECULATIVE DAMAGES.

120. Damages cannot be recovered for losses which are remote or speculative.

This rule is but the converse of the general rule that losses must be proximate and certain in order to be compensated. To entitle the plaintiff to recover more than nominal damages, it is incumbent upon him to prove actual and certain damage, and to show, further than this, that it was the natural result of the breach of its contract by the telegraph company, or was in the contemplation of both parties, when they made the contract, as a probable consequence of a breach of it. This qualification is laid down in Hadley v. Baxendale and Griffin v. Colver,[50] and is sufficiently illustrated by the following cases:

In W. U. Tel. Co. v. Cooper[51] it was held that failure to deliver a message to a physician, calling him to attend a patient, does not render the company liable for the patient's suffering, if the message could not have been delivered in time for him to have rendered any assistance. Of course, in such a case the company would be liable for nominal damages for its breach of contract, and for the price paid it for transmission of the message.[52]

In W. U. Tel. Co. v. Kendzora[53] which was an action for failure to deliver a message summoning a physician to attend plaintiff's wife, who died two days later, it was held that plaintiff could not recover for loss of his wife's services, where there was no evidence that her life could have been saved had the message been promptly delivered.

In Beasley v. Telegraph Co.[54] the plaintiff, to whom a message had been sent announcing the illness of his wife, sued the telegraph company for failure to deliver the message. It was held that he could not recover if, had the message been delivered in a reasonable time, he could not have reached his wife before her death.

[50] 16 N. Y. 489.

[51] 71 Tex. 507, 9 S. W. 598.

[52] And see Cutts v. Telegraph Co., 71 Wis. 46, 36 N. W. 627.

[53] 77 Tex. 257, 13 S. W. 986.

[54] 39 Fed. 181.

In W. U. Tel. Co. v. Smith [55] it was held that one suing a telegraph company for delay in delivering a message, whereby he was deprived of seeing his father alive, must show that the distance between him and his father, the means of travel, and the time required to make the trip, were such that he could have reached his father before the latter's death had the message been properly delivered.

In W. U. Tel. Co. v. Parks [56] it was held that delay in transmitting messages to and from a consulting physician, who in fact could not come, is no ground for damages beyond the cost of the dispatches, where it does not appear but that the attending physician did all that could be done, and that plaintiff suffered nothing from the delay but suspense of mind.

In Freeman v. Telegraph Co.[57] it was held that there could be no recovery for failure to deliver a message offering employment when the addressee was already under contract with another, consistently with which he could not have entered the employment of the sender.

In Hughes v. Telegraph Co.[58] it was held that, where the incorrect transmission of a telegram caused plaintiff to sell shares of stock for which he received the market value, his damages were limited to the cost of the message, though a few days later he was compelled, in order to buy shares of the same stock, to pay an advanced price.

In W. U. Tel. Co. v. Fellner [59] which was an action against a telegraph company for failure to deliver a message instructing the addressee to purchase for plaintiff 100 shares of certain stock, it was held that the mere fact that, within a few days after the message was sent, the price of such stock advanced $550, and so continued until suit was brought, did not entitle plaintiff to recover more than nominal damages, there being no evidence that, if the stock had been purchased, plaintiff would have ever sold it at a profit.

In Cahn v. Telegraph Co.[60] the plaintiff had sent a telegram to his brokers directing the latter to sell certain stock. The message was not delivered for several days, during which the price of the stock fell from $73 to $55 per share. The plaintiff in fact owned no stock. It was held that the company was not liable for the difference be-

[55] 30 S. W. 549 (Tex. Sup.).
[56] 25 S. W. 813 (Tex. Civ. App.).
[57] 93 Ga. 230, 18 S. E. 647.
[58] 114 N. C. 70, 19 S. E. 100.
[59] 58 Ark. 29, 22 S. W. 917.
[60] 46 Fed. 40.

tween the price of the stock when the telegram should have been delivered and the price to which it declined, because, "the plaintiff not having the stock in the hands of his brokers, and his telegram being an order to sell something he did not own, and it being admitted that if the telegram had been delivered in time the brokers would have sold, still there could have been no actual loss to plaintiff. The brokers would necessarily have gone into the market, and purchased at the market price,—viz. $73,—or used their own stock or the stock of others, which is the same thing and of the same value; hence it would have been a purchase and a sale of the stock on the same day and at the same price, and there could be no loss or damage predicated on this transaction." Plaintiff in this case could recover nominal damages and the cost of the message paid by him.[61]

In W. U. Tel. Co. v. Hall[62] the plaintiff brought suit against a telegraph company for delaying the delivery of a message directing the addressee to buy for plaintiff 10,000 barrels of petroleum, the market price of which when the message ought to have been delivered was $1.17 per barrel, but when received by the addressee had advanced to $1.35 per barrel. The addressee did not purchase. It was held that plaintiff, having suffered no actual loss, could only recover nominal damages, and not the contingent profit he might have made by buying at the one price and selling at the other. In this case the authorities are collated.[63]

In W. U. Tel. Co. v. Cooper[64] which was an action against a telegraph company for failing to deliver a message sent to plaintiff's family physician, calling him to attend plaintiff's wife in her confinement, it was held that there could be a recovery for the wife's increased suffering caused by her labor being prolonged, but not for the death of the child and consequent bereavement of the parents, as the latter damages were too remote, being the result of a secondary cause. It was further held that the plaintiff could not recover for his own mental suffering caused by alarm and sympathy for his wife's suffering, as it was too remote.

[61] Affirmed in 2 U. S. App. 24, 1 C. C. A. 107, and 48 Fed. 810.

[62] 124 U. S. 444, 8 Sup. Ct. 577.

[63] See, also, Cannon v. Telegraph Co., 100 N. C. 300, 6 S. E. 731.

[64] 71 Tex. 507, 9 S. W. 598.

In Rich Grain Distilling Co. v. W. U. Tel. Co.[65] it was held that, where a telegram requesting boiler makers to send a man to repair a boiler in a distillery is not delivered, damages cannot be recovered for probable profits on liquors that could have been made had no delay occurred by reason of such nondelivery.

In Duncan v. Telegraph Co.[66] it was held that a mistake in the transmission of a telegram, requesting the services of a veterinary surgeon, cannot be deemed the proximate cause of the death of a horse belonging to the sender of the telegram, where the evidence is merely conjectural as to whether the life of the horse might have been saved had a veterinary come at once, pursuant to a correct transmission.

In Smith v. Telegraph Co.[67] the plaintiff had deposited money with defendant telegraph company, to be transmitted to a bank for the payment of plaintiff's note due on that day, but, because of defendant's failure to notify the bank until the day following, the note went to protest. It was held that, in the absence of pecuniary loss resulting from defendant's failure, plaintiff could not recover for damages to his credit.

In Kenyon v. Telegraph Co.,[68] an action against a telegraph company for failure to deliver a message, by reason of which plaintiff failed to receive an appointment as deputy assessor, it was held that damages for loss of the salary he would have received are too speculative, since a deputy only holds office at the pleasure of the officer appointing him.[69]

In Walser v. Telegraph Co.[70] a telegraph company failed to deliver the following telegram, sent by the comptroller of the currency: "Would you accept receivership First National Bank Wilmington? * * * Compensation, $200 per month, subject to future modification." It was held that, where the pleadings raised no question as to exemplary damages, plaintiff could recover only nominal damages, since, if he had received the message and had sent an affirmative

65 13 Ky. Law Rep. 256 (Ky. Super. Ct.).
66 87 Wis. 173, 58 N. W. 75.
67 150 Pa. St. 561, 24 Atl. 1049.
68 100 Cal. 454, 35 Pac. 75.
69 And see Merrill v. Telegraph Co., 78 Me. 97, 2 Atl. 847.
70 114 N. C. 440, 19 S. E. 366.

reply, the government would have been under no obligation to confer the office on plaintiff.

In W. U. Tel. Co. v. Bowen,[71] an action against a telegraph company for failure to deliver a message, whereby plaintiff lost a contract for threshing certain grain, where the complaint showed the amount of grain to be threshed, and the rate of toll per bushel contracted for, it was held that the damages were not contingent or uncertain.

In W. U. Tel. Co. v. Clifton [72] it was held that the delay of a telegraph company in delivering a telegram to an attorney, requesting him to take the first train for a neighboring town, but which telegram contained nothing to show why he was wanted at that place, or what injuries would result to him from the delay in delivery, does not enable him to recover the attorney's fees which he might have earned had the dispatch been seasonably delivered, as such rule of damages would cover all possible and improbable consequences arising from the delay in delivering, instead of the probable consequences only.

In Chapman v. Telegraph Co.[73] it was held that the loss of a note which plaintiff avers his father would have given him had he been able to see him before his death is a consequence too remote to sustain a claim for damages for failure to deliver a telegram announcing the illness of the father.

In Alexander v. Telegraph Co.[74] it was held that where, by failure of a telegraph company to deliver a message, plaintiff lost the opportunity to buy for $3,000 land worth $5,000, and sought to recover the difference, the damages claimed are not so speculative, remote, or contingent as to absolve the company from liability.

In McAllen v. Telegraph Co.[75] it was held that damages for bruises received in consequence of being obliged to take a rough vehicle, instead of the family carriage, are too remote for a claim against a telegraph company for failure to transmit a message ordering the family carriage.

In Frazer v. Telegraph Co.,[76] which was an action for negligence in transmitting to plaintiff's a telegram announcing a rise in the

71 84 Tex. 476, 19 S. W. 554.
72 68 Miss. 397, 8 South. 746.
73 90 Ky. 265, 13 S. W. 880.
74 66 Miss. 161, 5 South. 397.
75 70 Tex. 243, 7 S. W. 715.
76 84 Ala. 487, 4 South. 831.

price of cotton, whereby plaintiffs sold their cotton for less than they could have obtained, it appeared that the sender was under no legal obligation to inform plaintiffs as to the price of cotton, and that plaintiffs did not rely on receiving information from him. It was held that the damages claimed were too remote.

In W. U. Tel. Co. v. Crall [77] it was held that damages cannot be recovered for inaccurate transmission on account of the loss of anticipated gains or profits, based on the probability of plaintiff's horse being able to win prize purses at a trotting race, as such damages are too remote, contingent, and speculative.

SAME—DAMAGES NOT WITHIN CONTEMPLATION OF PARTIES—NOTICE OF PURPOSE AND IMPORTANCE OF MESSAGE.

121. Consequential damages, arising out of circumstances not contemplated by both parties, cannot be recovered; but, if enough appears in the message to show that it relates to a commercial business transaction, it is sufficient to charge the company with damages resulting from default in its transmission.

It will be noticed that the rule laid down in Hadley v. Baxendale [78] requires that damages for breach of contract, to be recoverable, must be such as may fairly be considered as arising naturally from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, when they made the contract, as the probable result of the breach of it. If the damages sought to be recovered may fairly be considered as arising naturally out of the breach of contract itself, the party who has broken the contract will be presumed to have contemplated them as the probable result of a breach. If, on the other hand, the damages sought to be recovered arose out of special circumstances, not disclosed by the contract itself, they cannot be recovered, unless it is shown that such special circumstances were communicated or

[77] 39 Kan. 580, 18 Pac. 719.

[78] 9 Exch. 341.

known to the party who broke the contract, so that they can be considered as having been contemplated when he made the contract.[79]

In McColl v. Telegraph Co.[80] the dispatch was as follows: "Can close Valkyria and Othere, 22, 20 net, Montreal. Answer immediately." It was held that the sender could not recover commissions which he would have earned as a broker in effecting a charter of the two vessels named in the dispatch if the message had been duly transmitted, as they were not damages either actually contemplated or to be fairly supposed to have been contemplated by the company. "In the present case," it was said, "the text of the message which the defendants failed to transmit until after a delay of several days indicates upon its face no occasion for special care or the involving of the chartering of two vessels. There was no notice or information of any fact given to the defendant, or contained in the message itself, indicating its importance or that special damages would result from any neglect. However strongly the plaintiff may have felt assured, acting as a broker in the matter, that the offer telegraphed to his principals would be accepted, and that he would get his five per cent. commission, yet there is nothing in the case that places these contingencies, in themselves uncertain and remote, within the contemplation of the defendant. It is true the plaintiff's principals might have accepted the offer, and paid the plaintiff the commissions, and their evidence is that they would have accepted it if it had not been delayed by the neglect of the defendant in failing to forward it immediately. The claim of the plaintiff is for a special and contingent loss, and not for such a loss as was the natural and necessary consequence of the defendant's neglect, or such as, from the surrounding circumstances, could even be inferred by the de-

[79] See Smith v. Telegraph Co., 83 Ky. 104; W. U. Tel. Co. v. J. A. Kemp Grocer Co. (Tex. Civ. App.) 28 S. W. 905; W. U. Tel. Co. v. Lively (Tex. App.) 15 S. W. 197; McColl v. Telegraph Co., 44 N. Y. Super. Ct. 487; Baldwin v. Telegraph Co., 45 N. Y. 744; Mackay v. Telegraph Co., 16 Nev. 222, 228, and cases there collated; Dorgan v. Telegraph Co., Fed. Cas. No. 4,004; Smith v. Telegraph Co., 83 Ky. 104; Lowery v. Telegraph Co., 60 N. Y. 198; Hibbard v. Telegraph Co., 33 Wis. 558; W. U. Tel. Co. v. Graham, 1 Colo. 230; Squire v. Telegraph Co., 98 Mass. 232; First Nat. Bank of Barnesville v. W. U. Tel. Co., 30 Ohio St. 555.

[80] 44 N. Y. Super. Ct. 487.

fendant. The decision in Baldwin v. Telegraph Co.,[81] that, where a special purpose is intended by one party, and is unknown to the other, and does not appear by the message itself, in the assessment of damages, such special purpose cannot be taken into consideration, but that the damages must be limited to those resulting from the ordinary and obvious purpose of the contract, governs the case under consideration." [82]

[81] 45 N. Y. 744.

[82] In Smith v. Telegraph Co., supra, plaintiff had deposited with his brokers in New York securities to protect them in the purchase of stock on his account. Several purchases were made by them, of which he had notice. The brokers telegraphed him of another purchase, which telegram defendant failed to deliver. There was a decline in stocks, and plaintiff's margin was exhausted, and his stocks sold at a heavy loss. It was held, in a suit for damages for failure to deliver the telegram, that plaintiff could not recover on the ground that if he had known of the purchase mentioned in the message he would have protected his stock, and saved a portion of his deposit, such consequences not being the ordinary result of a failure to deliver the message, and contemplated when the company agreed to send it, and plaintiff could only recover the expense of sending the message.

In W. U. Tel. Co. v. Carter, 85 Tex. 580, 22 S. W. 961,—an action for failure to deliver promptly a message informing the addressee of the death of a relative, so that he was unable to reach the home of the relative in time to attend the funeral,—it was held that the expense of exhuming the body, and removing it to another place, was not the proximate result of the failure to deliver the message promptly, since it could neither be foreseen that if the message were not delivered promptly the body would be interred in a place which would be unsatisfactory to the addressee, nor could it be known that in such an event the addressee would wish to exhume it.

In W. U. Tel. Co. v. J. A. Kemp Grocer Co. (Tex. Civ. App.) 28 S. W. 905, it was held that a telegraph company failing to deliver a message ordering goods already sold by the sender for future delivery was not liable for loss of profits thereon, in the absence of notice of such sale.

In W. U. Tel. Co. v. Parlin & Orendorff Co. (Tex. Civ. App.) 25 S. W. 40, it was held that for failure of a telegraph company to deliver a message stating that the sender would, at a certain time, be at a certain place, the sender could not recover damages for loss of profits on goods which he would have sold the addressee, the company having no notice of the purpose of the message.

In W. U. Tel. Co. v. Cornwell, 2 Colo. App. 491, 31 Pac. 393, C. left a dispatch at defendant's telegraph office in S., to be forwarded to plaintiff at M. The dispatch was: "Strauss gone to Howard. Gave man gold watch by mistake. Left no word with me. Store closed. Answer." Strauss was a

On the question as to how far mere indefiniteness in the language of a message will defeat a recovery for consequential damages against a telegraph company, the decisions are not harmonious. There are some cases that go to the extent of holding that the operator who transmitted the message must have been able to understand its meaning as the sender and party to whom it was sent understood it; otherwise, it is said, he cannot reasonably be supposed to have contemplated damages as the probable consequence

clerk, whom plaintiff had left in charge of his jewelry store in his absence, and during the night or early in the morning, before the dispatch was sent, had robbed the store, and absconded with the property; and the dispatch was in relation to the absconding, but defendant's agent had no notice thereof. The dispatch remained in the S. office an hour and a half, and was then forwarded to the M. office, where it remained two hours before it was delivered, or any effort made to deliver it. *Held*, that plaintiff could not recover more than the cost of the message and incidental expenses.

In Cahn v. Telegraph Co., 2 U. S. App. 24, 1 C. C. A. 107, and 48 Fed. 810, it was held that a telegraph company could not be held liable for loss of profits alleged to result from delay in sending a message to sell 200 shares of certain stock merely because the operator who received the message for transmission was familiar with the method of dealing on the New York stock exchange, and knew from the message that a "short" sale was intended, which necessarily implied the sending of a subsequent order to buy for the purpose of "covering." It was further held in that case that, where one delivers to a telegraph company for transmission a message to sell 200 shares of certain stock, the legal presumption which the company is authorized to make is that it is an order to sell stock held by the sender, and not that he intended to sell something which he neither had nor proposed to acquire, for such a presumption would involve a violation of the law, as held by some of the highest courts in the country.

In W. U. Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649, a message to plaintiff had been delivered to defendant telegraph company reciting that a certain case was set for August 17th. As delivered to plaintiff, it read August 7th. It was held that defendant was liable for plaintiff's reasonable expenses in going to and from the trial, and the value of his time; but that, there being no evidence that the company had notice of special circumstances connected with the sending of the message, it was not liable for loss to plaintiff resulting from the necessity of shutting down his mill, idleness of his teams, etc., during his absence.

In Barrett v. Telegraph Co., 42 Mo. App. 542, it was held that for the failure of a telegraph company to transmit a telegram in relation to a shipment of three loads of cattle, and the cashing of a draft therefor, damages cannot be extended beyond the loss sustained on three loads, as only damages

of a failure to transmit it.[83] Most of the cases, however, hold that, where enough appears in the message to show that it relates to a commercial business transaction between the correspondents, it is sufficient to charge the company with damages resulting from its negligent transmission or a failure to transmit it.[84] In Postal Tel. Cable Co. v. Lathrop [85] the rule was stated to be that "where a message as written, read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from a negligent failure to transmit it as written," etc. Where a telegraph message, when read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as it is necessary to accomplish the purpose for which it is sent, the telegraph company is liable for all direct damages from the negligent failure to transmit or deliver it, as written, within a reasonable time.[86] Where the subject to which a telegram re-

as to such loads might be fairly considered as arising naturally, and to have been in contemplation of the parties to the contract.

In W. U. Tel. Co. v. Smith, 76 Tex. 253, 13 S. W. 169, the plaintiff delivered to a telegraph company for transmission a message as follows: "R. [Addressed]. Meet me in C. Saturday night. S.,"—which was not delivered to R.; and plaintiff brought an action against the company, alleging that by its negligence he was put to expense in hiring a conveyance to go from C. to R.'s home, and back again; that by loss of time he failed to meet important engagements; and that, by reason of exposure, his health was greatly impaired. It was held that the petition was bad on demurrer, the damages being too remote, conjectural, and not in contemplation of the parties, in case of a breach of the contract.

[83] See cases cited, supra.

[84] See Tyler v. Telegraph Co., 60 Ill. 421, 74 Ill. 168; Telegraph Co. v. Griswold, 37 Ohio St. 302; Marr v. Telegraph Co., 85 Tenn. 530, 3 S. W. 496; W. U. Tel. Co. v. Blanchard, 68 Ga. 299; Squire v. Telegraph Co., 98 Mass. 232; Hadley v. Telegraph Co., 115 Ind. 200, 15 N. E. 845; Manville v. Telegraph Co., 37 Iowa, 214; W. U. Tel. Co. v. Williford (Tex. Civ. App.) 27 S. W. 700; Herron v. Telegraph Co. (Iowa) 57 N. W. 696.

[85] 131 Ill. 575, 23 N. E. 583.

[86] Bierhaus v. Telegraph Co., 8 Ind. App. 246, 34 N. E. 581.

lates (as a proposition to sell goods at a given rate) is understood by the company, it is not necessary, in order to make it liable in compensatory damages for negligence in transmission, that the company should be able to foresee the exact amount of pecuniary loss which such negligence is likely to cause.[87] A telegraph company is not relieved from liability for special damage resulting from delay in delivering a message, which prevented plaintiff from entering into certain contracts, by the fact that at the time the message was sent it had no notice of the contracts plaintiff was about to enter into, or the damages liable to arise from such delay.[88]

Illustrations.

In United States Tel. Co. v. Wenger[89] a message read: "Buy fifty (50) Northwestern fifty (50) Prairie du Chien, limit forty-five (45)." There was a delay in its delivery, resulting in a loss to the sender on account of the advance in price of Chicago & Northwestern Railway Company stock, and the Milwaukee & Prairie du Chien Railway Company stock, which the message was intended to order purchased. A recovery was sustained, the court saying: "The dispatch was such as to disclose the nature of the business to which it related, and that the loss might be very likely to occur if there was a want of promptitude in transmitting it, containing the order."

In W. U. Tel. Co. v. Haman[90] a member of the plaintiff firm, after receiving instructions by telegraph, purchased a quantity of wool, and delivered to the defendant telegraph company a message advising the firm thereof, telling the agent that the message was important, and that he thought his firm had probably contracted to sell the wool; and, to avoid any mistake, he had the agent transcribe the message, and signed the copy. It was held that the circumstances surrounding the delivery of the message to the agent were sufficient to apprise him of its importance and the consequence of a failure to deliver it.

In Martin v. Telegraph Co.[91] the plaintiff sued defendant telegraph company for delay in delivering the message: "M. & Co. hold note

87 Pepper v. Telegraph Co., 87 Tenn. 554, 11 S. W. 783.

88 Gulf, C. & S. F. Ry. Co. v. Loonie, 82 Tex. 323, 18 S. W. 221.

89 55 Pa. St. 262.

90 2 Tex. Civ. App. 100, 20 S. W. 1133.

91 1 Tex. Civ. App. 143, 20 S. W. 860.

of W. Will be attached to-night. Your bank telegraph M. Bros., bankers, to make bond." It was held that the message was sufficient on its face to show that its prompt delivery was necessary to avert a loss.

In W. U. Tel. Co. v. Williford [92] the defendant telegraph company received for transmission to plaintiff the following message: "How many beeves and bulls have you? Don't go away; will get them off. Answer." It was held that the message advised defendant that it related to a matter of business in which loss would probably result if it was not promptly delivered, and defendant was liable for nominal damages, and for such further damages as naturally resulted from the failure to deliver the message.

In Bierhaus v. Telegraph Co.[93] an attorney wired wholesale dealers: "Have you claim against P. L. D.? Answer how much." The latter replied: "Yes; one hundred and sixty-one dollars and fifteen cents." It was held that the telegraph company was liable to such dealers for special damages for failure to deliver such messages within a reasonable time, though it was not informed of their importance otherwise than by their character.

In W. U. Tel. Co. v. Lowrey [94] it was held that a telegram directing commission merchants in Chicago to sell corn in their possession is sufficient of itself, without instructions, to indicate to the operator to whom it is delivered the necessity for its prompt transmission, so as to render the telegraph company liable for delay in transmitting it.

In Garrett v. Telegraph Co.[95] a dealer in cattle living in Iowa wired his Chicago correspondent, "Send me market, Kansas City, to-morrow and next day." He had previously sent and received a great many messages from that office. It was held that it was a question for the jury whether the message charged the company with notice that the sender intended to act upon the result of it in buying or selling cattle at Kansas City.

In Mowry v. Telegraph Co.[96] it appeared that, on the day the message was sent, plaintiffs received a message from defendant which gave the price of hams, etc., and in answer plaintiffs deliv-

[92] 2 Tex. Civ. App. 574, 22 S. W. 244.
[93] 8 Ind. App. 246, 34 N. E. 581.
[94] 32 Neb. 732, 49 N. W. 707.
[95] 83 Iowa, 257, 49 N. W. 88.
[96] 51 Hun, 126, 4 N. Y. Supp. 666.

ered to defendant the reply: "Will take two cars sixteens. Ship soon as convenient, via West Shore." It was held that the contents of the message were such as to indicate to defendant that it was important, and that a failure to send it would result in loss to the parties, and that defendant was liable for the loss to plaintiffs caused by the rise in the price of hams between the delivery of the message to defendant and its transmission.

In W. U. Tel. Co. v. Sheffield [97] the plaintiffs sued defendant telegraph company for delay in transmitting the message, "You had better come and attend to your claim at once," sent to them by a bank which was holding notes for collection for plaintiffs against a failing debtor. It was held that the language of the message was sufficient, of itself, to indicate to the operator the urgency of the message, so as to bring such matter into the contemplation of the parties in sending the message. And it was further held that the necessity of speed and carefulness was sufficiently shown by the message, without the addition of the names of the debtors, the claims against whom demanded attention.

Of course, when the receiving agent knows personally the purpose and urgency of a message, it need not be shown that notice thereof was given him by the sender, for to give him notice thereof would be useless.[98] If the agent knew of the importance of the prompt delivery of the message, or could have discovered it from the terms of the telegram, or from other telegrams in reference to the same matter, the company is chargeable with knowledge of the fact.[99]

SAME—MESSAGES NOT UNDERSTOOD—CIPHER MESSAGES.

122. Where a message cannot be understood by the company's agents, consequential damages cannot be recovered.

EXCEPTION—In some jurisdictions telegraph companies are held liable for damages caused by their default whether or not the result was known by the company to be probable.[100]

[97] 71 Tex. 570, 10 S. W. 752.

[98] W. U. Tel. Co. v. Jobe, 6 Tex. Civ. App. 403, 25 S. W. 1036.

[99] Erie Telegraph & Telephone Co. v. Grimes, 82 Tex. 89, 17 S. W. 831.

[100] Sedg. Dam. § 891.

The General Rule.

It is held, in most jurisdictions, that where a message cannot be understood by the company's agents, as where it is written in cipher, consequential damages cannot be recovered, and the company is liable only for nominal damages, or at most the price paid for sending the message. All the cases which hold that a telegraph company is not liable for consequential damages for a failure to transmit a dispatch as received, on the ground of indefiniteness or obscurity in the language of the message, do so upon the ground that, unless the agent of the company may reasonably know from the message itself, or is informed by other means, that it relates to a matter of business importance, he cannot be supposed to have contemplated damages as a result from his failure to send it as written.

The supreme court of Wisconsin, in Candee v. Telegraph Co.,[101] say: "The operator who receives and who represents the company, and may for this purpose be said to be the other party to the contract, cannot be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance and in respect to which pecuniary loss or damages will naturally arise in case of his failure or omission to send it. It may be a mere items of news, or some other communication of trifling and unimportant character."

In Postal Tel. Cable Co. v. Lathrop [102] it is said: "It is clear enough that, applying the rule in Hadley v. Baxendale,[103] a recovery cannot be had for a failure to correctly transmit a mere cipher dispatch, unexplained, for the reason that to one unacquainted with the meaning of the ciphers it is wholly unintelligible and nonsensical. An operater would therefore be justifiable in saying it contains no information of value as pertaining to a business transac-

[101] 34 Wis. 472.

[102] 131 Ill. 575, 23 N. E. 583. Cf. W. U. Tel. Co. v. Hyer Bros., 22 Fla. 637, 1 South. 129, where it was said: "The larger part of all messages sent are of a commercial or business nature, which suggest value. The requirements of friendship or pleasure can await other means of less severity and less expense. If this be true, why should the law assume that, as a rule, all messages sent over it are unimportant, and that an important one is an exception, of which the operator is to be informed?"

[103] 9 Exch. 341.

tion, and a failure to send it, or a mistake in its transmission, can reasonably result in no pecuniary loss."

In W. U. Tel. Co. v. Way [104] it is said that the rule in Hadley v. Baxendale "has been universally accepted to mean that liability for damages, in cases of mere breach of contract, must have some necessary relation to what may naturally be expected to follow its violation, or to such results as may be fairly supposed, in the eye of the law, to have entered into the contemplation of the parties when they made the contract. The knowledge which is the basis of this liability, and which imputes notice of the object of the contract, can be derived only in one of two ways: (1) From the face of the message itself; or (2) from extrinsic information imparted by the sender. Unintelligible or cipher dispatches give no clue as to the special damage that may result from negligence in transmitting them, and afford no ground for the company to suppose that any loss other than nominal can follow from a failure to send them. The wisdom and justice of the rule is nowhere better illustrated than in the transmission of such dispatches. When the sender elects to studiously conceal from the operator the contents or nature of the message, he thereby deliberately puts the telegraph company in the darkness of ignorance as to the character of the duty imposed upon it, or the magnitude of its liability. The company cannot know, therefore, whether the breach of the obligation will probably be followed by a hundred or a hundred thousand dollars damages. This is both unreasonable and unjust, for telegraph companies are not common carriers or insurers; but their liability, like that of ordinary bailees, is based upon the degree of care or negligence exercised by them in the discharge of their duties. The care and diligence must then, upon every well-settled principle of our jurisprudence, be in proportion to the duty in hand, varying according to the magnitude and nature of the subject-matter of the bailment. Nothing is more important or just, in this view of the subject, than that the law should require the sender at his hazard to disclose the meaning or nature of the message, in order that the company may observe such precautions as may be necessary to guard itself against the risk incident to the duty to be performed." [105]

[104] 83 Ala. 542, 4 South. 853, per Sommerville, J., dissenting.

[105] See Primrose v. Telegraph Co., 154 U. S. 1, 14 Sup. Ct. 1098; Birney v.

In Primrose v. Telegraph Co.[106] it was held that a telegraph company is not liable to the sender of a message for losses on purchases of wool caused by a mistake in transmitting it, where it was in cipher, wholly unintelligible to the company and its agents, and they were not informed of the nature, importance, or extent of the transaction to which it related, or of the probable consequences, if it were transmitted incorrectly, although they knew that the sender was a wool merchant, and that the person addressed was in his employ.

The Exception.

Some of the courts have taken a contrary view, and have held that a telegraph company which negligently fails to send or to deliver, or which makes a mistake in transmitting, a message, is liable for all the damages naturally flowing from such failure or mistake, though the message was in cipher and its contents uncommunicated and wholly unintelligible to the company.[107] It was said in W. U. Tel. Co. v. Way[108] that the principle of the Hadley v. Baxendale case, construed with reference to the facts of the case and the questions involved, "is that special circumstances, which take the contract out of the usual course of things, must be communicated, in

Telegraph Co., 18 Md. 341; United States Tel. Co. v. Gildersleve, 29 Md. 232; Baldwin v. Telegraph Co., 45 N. Y. 744; Landsberger v. Telegraph Co., 32 Barb. (N. Y.) 530; McColl v. Telegraph Co., 44 N. Y. Super. Ct. 487; Daniel v Telegraph Co., 61 Tex. 452; First Nat. Bank of Barnesville v. W. U. Tel. Co., 30 Ohio St. 555; Stevenson v. Telegraph Co., 16 U. C. Q. B. 530; W. U. Tel. Co. v. Martin, 9 Ill. App. 587; Sanders v. Stuart, 1 C. P. Div. 326, 45 Law J. C. P. 682; Beaupre v. Telegraph Co., 21 Minn. 155; Mackay v. Telegraph Co., 16 Nev. 222; Camp v. Telegraph Co., 1 Metc. (Ky.) 164; W. U. Tel. Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577; Cannon v. Telegraph Co., 100 N. C. 300, 6 S. E. 731; Abeles v. Telegraph Co., 37 Mo. App. 554; Behm v. Telegraph Co., Fed. Cas. No. 1,234; Hill v. Telegraph Co. (S. C.) 20 S. E. 135; W. U. Tel. Co. v. Wilson, 32 Fla. 527, 14 South. 1 (overruling W. U. Tel. Co. v. Hyer Bros., 22 Fla. 637, 1 South. 129).

[106] 154 U. S. 1, 14 Sup. Ct. 1098.

[107] Daughtery v. Telegraph Co., 75 Ala. 168; W. U. Tel. Co. v. Way, 83 Ala. 542, 4 South. 844; American Union Tel. Co. v. Daughtery, 89 Ala. 191, 7 South. 660; W. U. Tel. Co. v. Fatman, 73 Ga. 285; Postal Tel. Cable Co. v. Lathrop, 33 Ill. App. 400 (affirmed in 131 Ill. 575, 23 N. E. 583); W. U. Tel. Co. v. Reynolds, 77 Va. 173; W. U. Tel. Co. v. Hyer Bros., 22 Fla. 637, 1 South. 129 (overruled by W. U. Tel. Co. v. Wilson, 32 Fla. 527, 14 South. 1).

[108] 83 Ala. 542, 4 South. 844.

order to become an element of the duty in reference to which the parties are presumed to contract, and, if unknown, damages suffered by reason of the existence of such special circumstances are not recoverable; but that, in all cases, the damages which would naturally, generally, and proximately result from a breach of the contract, 'according to the usual course of things,' are recoverable. Whether or not actually contemplated by the parties, the law conclusively presumes them to have been in their contemplation. Such, as this court understands, is the proper construction to be placed on the words 'in the contemplation of both parties at the time they made the contract,' as employed in the statement of recoverable damages in Hadley v. Baxendale." The cases supporting this rule are certainly opposed to the weight of authority, but it is by no means clear that they cannot be sustained on principle. As has been seen, the direct loss caused by a breach of contract may be compensated, even though it was wholly unexpected.[109] The direct damages resulting from breach of contract to transmit a cipher message is the loss of the value of the information contained.[110] This value, and not the consideration paid for sending the message, should be the measure of damages. The rule of Hadley v. Baxendale limits liability only for consequential damages. It does not apply to direct damages.

Abbreviations.

Abbreviations commonly used in trade and understood, or which ought to be understood, by the telegraph company, do not make a telegram a cipher message.[111]

SAME—AVOIDABLE CONSEQUENCES.

123 Plaintiff cannot recover for consequential losses which he could have avoided with reasonable diligence.

The rule of avoidable consequences applies with full force to contracts with telegraph companies for the transmission of mes-

[109] See ante, p. 38.

[110] Sedg. Dam. § 892.

[111] Pepper v. Telegraph Co., 87 Tenn. 554, 11 S. W. 783; Postal Tel. Cable Co. v. Lathrop, 131 Ill. 575, 23 N. E. 583.

sages. The sender or addressee of a telegram, as the case may be, on discovering that it has not been sent or delivered, or that an error has occurred in its transmission, must take all reasonable steps to prevent loss. The law imposes upon a party subjected to injury by the action of another the active duty of making reasonable exertions to render the injury as light as possible. "Where the injury results from breach of contract or unintentional negligence, this obligation to reduce the consequence of the injury by reasonable diligence is positively imposed by every consideration of public interest and sound morality; and if the injured party, through negligence or willfulness, allows the damage to be unnecessarily enhanced, the increased loss falls justly on him."[113] In Marr v. Telegraph Co.[114] the plaintiff had delivered to the defendant a message to a broker to buy 1,000 shares of certain stock for him, and by mistake the message was sent for 100 shares only. The plaintiff knew of the mistake the day after the 100 shares had been purchased, but did not renew his order until several days after the stock had advanced. It was held that, for the advance occurring after the plaintiff could have remedied the mistake, the defendant was not responsible. In Daughtery v. Telegraph Co.[115] the court held that, for failure to deliver a message directing the sale of cotton owned by the sender, he could recover the actual damages sustained by a fall in the price of the cotton between the time when it would have been sold if the message had been delivered, and the time it was actually sold, but added the qualification that, as soon as the sender discovered that the message had not been sent, it became his duty, within a reasonable time, to repeat the order or direction to sell, or to take other requisite steps to prevent further loss. In W. U. Tel. Co. v. Hearne,[116] an action against a telegraph company for failure to transmit a telegram, whereby the mortgage on plaintiff's property was foreclosed, it was held that plaintiff must show that he could not obtain, from other sources, funds necessary to discharge the debt maturing by failure to send the telegram as agreed. In Gulf,

[113] Marr v. Telegraph Co., 85 Tenn. 529, 3 S. W. 496; Leonard v. Telegraph Co., 41 N. Y. 544; Rittenhouse v. Independent Line of Telegraph, 44 N. Y. 263.

[114] 85 Tenn. 529, 3 S. W. 496.

[115] 75 Ala. 168.

[116] 7 Tex. Civ. App. 67, 26 S. W. 478.

C. & S. F. Ry. Co. v. Loonie,[117] which was an action against a telegraph company for failure to deliver a telegram sent by plaintiff, directing that certain building plans be sent to him at C., so as to enable him to conclude contracts for the material to be used in the building, it was held that the refusal to instruct the jury that it was plaintiff's duty to use reasonable efforts to avoid or lessen his damage, and if a reasonably prudent business man would have sent another telegram for the plans, and if such telegram had been sent the plans would have reached plaintiff in time to have consummated his contract, then plaintiff is only entitled to compensation for the value of his time and expense during the extra time he would have been kept at C. on account of the delay, was error.

EXEMPLARY DAMAGES.

124. Telegraph companies are liable for exemplary damages whenever other defendants would be liable.

Exemplary or punitive damages are given, not by way of compensation, but by way of punishment, for the purpose of deterring the defendant and others from similar acts in the future.[118] They are not allowed for a mere breach of contract. In such cases the damages are compensatory only. Nor are they allowed for mere negligence without any aggravating circumstances.[119] But for negligence that is gross, or any wrong that is willful or malicious, exemplary damages may be recovered in addition to the damages allowed as compensation.[120] This rule applies in all the states to actions against telegraph companies for failure to send or deliver a message, where the action is in tort, and based on the company's negligence. Unless there is a willful breach of duty, or gross negligence, punitive or exemplary damages cannot be allowed. But if, on the other hand, there is gross negligence or willfulness, the company is liable

[117] 82 Tex. 323, 18 S. W. 221.

[118] Berry v. Fletcher, Fed. Cas. No. 1,357.

[119] McCall v. McDowell, Fed. Cas. No. 8,673; Berry v. Fletcher, Fed. Cas. No. 1,357; Milwaukee & St. P. Ry. Co. v. Arms, 91 U. S. 489.

[120] Philadelphia W. & B. R. Co. v. Quigley, 21 How. 202; Day v. Woodworth, 13 How. 363.

for punitive or exemplary damages in addition to the damage actually sustained.[121] In McAllen v. Telegraph Co.[122] it appeared that plaintiff was informed by defendant's agent that there was a telegraph office at the station to which he sent the message, and that the agent soon after sending the message discovered that the office had been closed, but concealed this knowledge from plaintiff. The agent was not informed that the message, which in form was an ordinary telegram, was of great importance. It was held that exemplary damages could not be recovered. In West v. Telegraph Co.[123] it appeared that the telegraph company accepted a written message, and received pay for its immediate transmission and delivery, and the agents of the company failed to transmit or deliver the same, on account of such gross negligence as amounted to wantonness or a malicious purpose, and the company was held liable for exemplary damages in addition to the actual damages sustained.

At common law, exemplary damages cannot be recovered in an action for breach of contract, compensatory damages only being considered in such actions, and therefore exemplary damages could not be recovered against a telegraph company in an action ex contractu for failing to send or deliver a message. The action to warrant the allowance of exemplary damages would have to be ex delicto for its negligence. The common-law doctrine, however, has been done away with in those states which have abolished by statute the distinction between forms of action. Such is the case, for instance, in Texas. "If the facts stated show a breach of contract, and also that the breach is of such a character as to authorize a suit as for a tort, all the damages recoverable for the thing done or committed, either in an action ex delicto or ex contractu, may be recovered in the one suit."[124]

[121] Beasley v. Telegraph Co., 39 Fed. 181; American Union Tel. Co. v. Daughtery, 89 Ala. 191, 7 South. 660; W. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419; McAllen v. Telegraph Co., 70 Tex. 243, 7 S. W. 715; West v. Telegraph Co., 39 Kan. 93, 17 Pac. 807.

[122] 70 Tex. 243, 7 S. W. 715.

[123] 39 Kan. 93, 17 Pac. 807.

[124] Gulf, C. & S. F. Ry. Co. v. Levy, 59 Tex. 547; Stuart v. Telegraph Co., 66 Tex. 580, 18 S. W. 351.

CHAPTER XII.

DAMAGES FOR DEATH BY WRONGFUL ACT.

125. The Rule at Common Law.
126. Damages in Statutory Action—Pecuniary Loss.
127. No Damages for Solatium.
128. Exemplary Damages.
129. No Damages for Injury to Deceased.
130. Medical and Funeral Expenses.
131. Meaning of "Pecuniary."
132. Prospective Pecuniary Losses.
133. Future Care and Support.
134–135. Future Services.
136. Prospective Gifts.
137. Prospective Inheritance.
138. Evidence of Pecuniary Condition of Beneficiaries.
139. Expectation of Life—Life Tables.
140. Interest as Damages.
141. Reduction of Damages.
142. Discretion of Jury.
143. Nominal Damages.
144. Allegation of Damages.

THE RULE AT COMMON LAW.

125. At common law no civil action could be maintained for wrongfully causing the death of a human being.

History of Rule.

In 1606, in Higgins v. Butcher,[1] where the defendant had assaulted and beaten the plaintiff's wife, from which she died, it was held that the plaintiff could not recover. All the case decided was that, where the person to whom a wrong is done dies, the action dies.[2] The question was not raised again in England until 1808, when, in Baker v. Bolton,[3] Lord Ellenborough laid down his famous proposition that, "in a civil court, the death of a human being cannot be complained of as an injury." The law was extended in Osborne v.

[1] Yel. 89. [2] Tiff. Death Wrongf. Act, c. 1. [3] 1 Camp. 493.

Gillott,[4] by holding that, while a master can sue for injury done his servant by wrongful act or negligence, whereby the service of the servant is lost to his master, still if the injury result in the servant's death, the master's compensation is gone.[5] The early American cases were not in accord with Baker v. Bolton.[6] The common-law rule, however, has been unanimously accepted by the courts of the various states and of the United States.[7]

Reason of Rule.

None of the many reasons assigned for the rule has been generally accepted as satisfactory. In England it has been urged that the rule is based on the merger of the wrong resulting in death into the felony involved. The sufficiency of this reason has been denied in England, and in America the doctrine has been generally repudiated.[8] Forfeiture,[9] as an explanation, is as objectionable.[10] "Actio personalis moritur cum persona" is a restatement, and not an explanation, of the rule. Moreover, it does not apply to any one not a party to the action, as the master, parent, or husband.[11] Pub-

[4] L. R. 8 Exch. 88.

[5] But, where death does not at once ensue, the person entitled to the services of the one injured may recover for the loss accruing between the injury and the death, and such action is not barred by the death. Hyatt v. Adams, 16 Mich. 180.

[6] Tiff. Death Wrongf. Act, § 6; Cross v. Guthery (1794) 2 Root, 90; Ford v. Monroe (1838) 20 Wend. 210; Plummer v. Webb (1825) 1 Ware, 75, Fed. Cas. No. 11,234; Carey v. Railroad Co. (1848) 1 Cush. 475. See Palfrey v. Railroad Co., 4 Allen, 55; Eden v. Railroad Co. (1853) 14 B. Mon. 165; James v. Christy (1853) 18 Mo. 162; Shields v. Yonge, 15 Ga. 349; Chick v. Railroad Co., 57 Ga. 357; McDowell v. Railroad Co., 60 Ga. 320; Sullivan v. Union Pac. R. Co., 3 Dill. 334, Fed. Cas. No. 13,599; McGovern v. Railroad Co., 67 N. Y. 417; Cutting v. Seabury, 1 Spr. 522, Fed. Cas. No. 3,521.

[7] Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265; City of Eureka v. Merrifield, 53 Kan. 794, 37 Pac. 113; Green v. Railroad Co., 28 Barb. 9; Insurance Co. v. Brame, 95 U. S. 754; Asher v. Cabell, 1 C. C. A. 693, 50 Fed. 818–824; The Corsair, 145 U. S. 335–344, 12 Sup. Ct. 949; Hyatt v. Adams, 16 Mich. 180–185 (collecting cases); Tiff. Death Wrongf. Act, §§ 11, 13, 14 (collecting cases).

[8] Hyatt v. Adams, 16 Mich. 180; Carey v. Railroad Co., 1 Cush. 475; 2 Bish. Crim. Law (2d Ed.) § 270.

[9] Shields v. Yonge, 15 Ga. 349.

[10] Grosso v. Railroad Co., 50 N. J. Law, 317, 13 Atl. 233.

[11] Green v. Railroad Co., *41 N. Y. 294, 28 Barb. 9.

lic policy, that enlightened nations are unwilling to set a price on human life, that the value of life is too great to be estimated in money, or that the law refuses to recognize the interest of one person in the death of another, are all unsatisfactory, if not absurd, reasons.[12] It is of no practical utility to search further for the reason of the rule.[13] The rule is barbarous, and rests on adjudication, in fact.[14]

Except as modified by statute, the common-law rule as to discharge by death remains in force. But, almost universally, direct legislation has practically abrogated it by creating a new action. The English statute (Lord Campbell's Act) for compensating the families of persons killed by accident was passed in 1846. Statutes similar to this have been passed by most of the states of the United States of America and by many of the provinces of Canada.[15] These acts do not repeal nor create an exception to the common law. "A totally new action," said Lord Blackburn,[16] "is given against the person who would have been responsible to the deceased if the deceased had lived,—an action which * * * is new in its species, new in its quality, new in its principle, in every way new, and which can be brought by a person answering the description of the widow, parent, or child who, under such circumstances, has suffered pecuniary loss."

The constitutionality of the various acts giving a remedy in case of death has not been seriously questioned,[17] but generally sustained,

[12] Osborn v. Gillett, L. R. 8 Exch. 88; Smith, Neg. (2d Ed.) 256; Hyatt v. Adams, 16 Mich. 180; Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265.

[13] Leonard, J., in Green v. Railroad Co., *41 N. Y. 294.

[14] Pol. Torts, 53. The rule rests more on artificial distinction than any real principle, and savors more of the logic of the schoolmen than of common sense. Hyatt v. Adams, 16 Mich. 180.

[15] Tiff. Wrongf. Act, p. xvii. (analytical table of statutes).

[16] Seward v. The Vera Cruz, 10 App. Cas. 59; Blake v. Railway Co., 18 Q. B. 93, 21 Law J. Q. B. 233; Whitford v. Railroad Co., 23 N. Y. 465; Littlewood v. Mayor, etc., 89 N. Y. 24; Russell v. Sunbury, 37 Ohio St. 372; Hamilton v. Jones, 125 Ind. 176, 25 N. E. 192; Hulbert v. City of Topeka, 34 Fed. 510; Mason v. Railroad Co., 7 Utah, 77, 24 Pac. 796.

[17] Southwestern R. Co. v. Paulk, 24 Ga. 356; Board of Internal Improvement for Shelby Co. v. Scearce, 2 Duv. (Ky.) 576; Georgia Railroad & Banking Co. v. Oaks, 52 Ga. 410.

even where the remedy was made to apply exclusively to railroad corporations.[18]

The authorities are about equally divided as to whether these statutes are to be liberally or strictly construed. On the one hand, it is said that they are remedial, and should consequently receive a liberal construction.[19] On the other hand, it is said that they are in derogation of the common law, and should consequently receive a strict interpretation.[20]

DAMAGES IN STATUTORY ACTION—PECUNIARY LOSS.

126. In an action under Lord Campbell's act, or similar statutes, the damages are measured by the pecuniary loss resulting to the beneficiaries of the action from the death, unless the statute prescribed a different measure.

The distinguishing feature of Lord Campbell's act, and of acts similar to it in respect to damages, is that the damages to be recovered are solely such as result from the death to the persons for whose benefit the action is given. This feature is common to most, but not all, of the acts in force in the United States and Canada.[21] The amount of damages recoverable depends, of course, somewhat upon the language of the statute under which the action is brought. But in spite of differences in phraseology, it is believed that the principles applicable in the measure of damages under all these acts is the same, viz. that the damages are measured by the pecuniary loss resulting to the beneficiaries of the action from the death.[22] This statement, however, is subject to the qualification that certain

[18] Boston, C. & M. R. v. State, 32 N. H. 215; Schoolcraft's Adm'r v. Louisville & N. R. Co., 92 Ky. 233, 17 S. W. 567. Compare Smith v. Railroad Co., 75 Ala. 449. And, generally, see Denver, S. P. & P. Ry. Co. v. Woodward, 4 Colo. 162; Chicago, St. L. & N. O. R. Co. v. Pounds, 11 Lea (Tenn.) 127.

[19] Tiff. Death Wrongf. Act, c. 2, § 32, collecting cases.

[20] Id.

[21] Tiff. Death Wrongf. Act, c. 9, where the statutes are carefully collated.

[22] Walker v. Railway Co. (Mich.) 62 N. W. 1032.

of the acts authorize exemplary, in addition to compensatory, damages.

Many statutes provide that the amount that may be recovered as damages shall not exceed a certain sum. This sum is limited to $5,000 in Colorado, Connecticut, Illinois, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New York, Oregon, Wisconsin, and Wyoming; to $7,000 in New Hampshire; to $10,000 in the District of Columbia, Indiana, Kansas, Ohio, Oklahoma, Utah, Virginia, and West Virginia; and to $20,000 in Montana. In New Brunswick the reasonable expectation of benefit from the continuance of the life is confined to a period not exceeding 10 years. With these exceptions, the statutes impose no limit.*

NO DAMAGES FOR SOLATIUM.

127. Damages cannot be recovered as a solatium for wounded feelings.

In Blake v. Midland Ry. Co.,[23] which is perhaps the leading case upon the measure of damages, Coleridge, J., said: "The title of this act may be some guide to its meaning; and it is 'An act for compensating the families of persons killed,' not for solacing their wounded feelings;" and in that case it was held that, in assessing damages, the jury could not take into consideration the mental sufferings of the plaintiff for the loss of her husband, and that, as the damages exceeded any loss sustained by her admitting of a pecuniary estimate, they must be considered excessive. The New York act, and some others which have been modeled upon it, require the damages to be assessed with reference to the "pecuniary" injuries. But, irrespective of the use of "pecuniary" in the various enactments, the construction adopted in Blake v. Midland Ry. Co. has been almost universally followed, and it is held that the jury are confined to the pecuniary loss, and that nothing can be allowed by way of solatium for the grief and wounded feelings of the beneficiaries,[24] or to compensate them for the loss of society or of com-

* See Tiff. Death Wrongf. Act, p. xvii. (analytical table of statutes).

[23] 18 Q. B. 93; 21 Law J. Q. B. 233; 16 Jur. 562.

[24] This principle is expressly declared in nearly every case in which the measure of damages is discussed. It is sufficient to cite the following: H

panionship which they have suffered.[25] A different rule was once declared in Indiana,[26] and was followed until recently in California,[27]

linois Cent. R. Co. v. Barron, 5 Wall. 95; Id., 1 Biss. 412, Fed. Cas. No. 1,052, 1 Biss. 453, Fed. Cas. No. 1,053; Whiton v. Railroad Co., 2 Biss. 282, Fed. Cas. No. 17,597; Id., 13 Wall. 270; Little Rock & Ft. S. Ry. Co. v. Barker, 33 Ark. 350; City of Chicago v. Major, 18 Ill. 349; Conant v. Griffin, 48 Ill. 410; City of Chicago v. Scholten, 75 Ill. 468; Chicago City Ry. Co. v. Gillam, 27 Ill. App. 386; Barley v. Railroad Co., 4 Biss. 430, Fed. Cas. No. 997; Brady v. Chicago, 4 Biss. 448, Fed. Cas. No. 1,796; Kansas Pac. Ry. Co. v. Cutter, 19 Kan. 83; State v. Baltimore & O. R. Co., 24 Md. 84; Mynning v. Railroad Co., 59 Mich. 257, 26 N. W. 514; Hutchins v. Railway Co., 44 Minn. 5, 46 N. W. 79; Collins v. Davidson, 19 Fed. 83; Hardy v. Railway Co., 36 Fed. 657; Schaub v. Railroad Co., 106 Mo. 74, 16 S. W. 924; McGowan v. Steel Co. (Mo. Sup.) 16 S. W. 236; Atchison, T. & S. F. R. Co. v. Wilson, 1 C. C. A. 25, 48 Fed. 57; Besenecker v. Sale, 8 Mo. App. 211; Anderson v. Railroad Co., 35 Neb. 95, 52 N. W. 840; Oldfield v. Railroad Co., 14 N. Y. 310; Tilley v. Railroad Co., 29 N. Y. 252, 24 N. Y. 471; Wise v. Teerpenning, 8 N. Y. Leg. Obs. 153; Goss v. Railroad Co., 50 Mo. App. 614; Storrie v. Marshall (Tex. Civ. App.) 27 S. W. 224. The court having charged, in the language of the Code, that a fair and just compensation could be recovered for the pecuniary injuries resulting to the persons for whose benefit the action was brought, a refusal to charge additionally that plaintiff cannot recover for the suffering of the child or for his own mental suffering, and that the jury cannot award punitive damages, is reversible error, as such principles do not sufficiently appear in the instruction given. Dorman v. Railroad Co. (City Ct. Brook.) 1 N. Y. Supp. 334; Steel v. Kurtz, 28 Ohio St. 191; Au v. Railroad Co., 29 Fed. 72; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Cleveland & P. R. Co. v. Rowan, 66 Pa. St. 393; Pennsylvania R. Co. v. Butler, 57 Pa. St. 335; March v. Walker, 48 Tex. 375; Southern Cotton P. & M. Co. v. Bradley, 52 Tex. 587; Galveston v. Barbour, 62 Tex. 172; Galveston, H. & S. A. Ry. Co. v. Matula, 79 Tex. 577, 15 S. W. 573; Taylor, B. & H. Ry. Co. v. Warner, 84 Tex. 122, 19 S. W. 449, and 20 S. W. 823; McGown v. Railroad Co., 85 Tex. 289, 20 S. W. 80; Webb v. Railway Co., 7 Utah, 17, 24 Pac. 616; Hyde v. Railway Co., 7 Utah, 356, 26 Pac. 979; Wells v. Railway Co., 7 Utah, 482, 27 Pac. 688; Needham v. Railroad Co., 38 Vt. 294; Potter v. Railway Co., 21 Wis. 372. Under the Scotch law the jury may administer a solatium. Patterson v. Wallace, 1 Macq. H. L. Cas. 748.

[25] Gillard v. Railway Co., 12 L. T. 356; Schaub v. Railroad Co., 106 Mo. 74, 16 S. W. 924; Atchison, T. & S. F. R. Co. v. Wilson, 1 C. C. A. 25, 48 Fed. 57; Green v. Railroad Co., 2 Abb. Dec. 277, affirming 32 Barb. 27; Taylor, B. & H. Ry. Co. v. Warner, 84 Tex. 122, 19 S. W. 449, and 20 S. W. 823; McGown v.

[26] See note 26 on following page.

[27] See note 27 on following page.

but these states are no longer exceptions to the common rule. In Quebec, also, it was formerly held that damages could be allowed as a solatium,[28] but, under the later decisions, it is held that the damages must be confined to the pecuniary loss.[29] In Virginia,[30]

Railroad Co., 85 Tex. 289, 20 S. W. 80; Pepper v. Southern Pac. Co., 105 Cal. 389, 38 Pac. 974; Gulf, C. & S. F. Ry. Co. v. Finley (Tex. Civ. App.) 32 S. W. 51, and cases in preceding note. In an action by the husband, the court charged that damages should be given as a pecuniary compensation, the jury measuring plaintiff's loss by a just estimate of the wife's services and companionship; that is, by their value in a pecuniary sense, nothing being allowed for plaintiff's wounded feelings. *Held*, no error, companionship evidently being intended to express service. Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329.

[26] Long v. Morrison, 14 Ind. 595. This case, so far as it holds that damages for anything but the pecuniary injury can be recovered, was disapproved in Jeffersonville R. Co. v. Swayne's Adm'r, 26 Ind. 477. Louisville, N. A. & C. Ry. Co. v. Rush, 127 Ind. 545, 26 N. E. 1010. See, also, Ohio & M. R. Co. v. Tindall, 13 Ind. 366.

[27] Beeson v. Mining Co., 57 Cal. 20; McKeever v. Railroad Co., 59 Cal. 294; Cook v. Railroad Co., 60 Cal. 604; Nehrbas v. Railroad Co., 62 Cal. 320; Cleary v. Railroad Co., 76 Cal. 240, 18 Pac. 269. In Morgan v. Southern Pac. Co., 95 Cal. 510, 30 Pac. 603, all the cases are reviewed, and it is there held, in accordance with the general rule, that the recovery is limited to the actual pecuniary loss. Munro v. Railroad Co., 84 Cal. 515, 24 Pac. 303. Under the original California act exemplary damages were expressly provided for. Myers v. San Francisco, 42 Cal. 215.

[28] Ravary v. Railway Co., 6 Low. Can. Jur. 49, reversing 1 L. C. Jur. 280. The decision rested on the ground that the right to recover such damages existed under the civil law, and was not abolished by the statute.

[29] Canadian Pac. Ry. Co. v. Robinson, 14 Can. Sup. Ct. 105, reversing 2 M. L. R. Q. B. 25; City of Montreal v. Labelle, 14 Can. Sup. Ct. 741. See, also, Provost v. Jackson, 13 L. C. Jur. 170; Ruest v. Railway Co., 4 Quebec L. R. 181; Grand Trunk Ry. Co. v. Ruel, 1 Leg. News, 129.

[30] Baltimore & O. R. Co. v. Noell, 32 Grat. 394; Matthews v. Warner, 29 Grat. 570. The court in the latter case rests its decision on the language of the act which provides that the jury "may award such damages as to it may seem fair and just," and which it says differs from that of other states in not expressly or impliedly limiting the damages to pecuniary loss. Christian, J., says: "I think it is manifest that the legislature intended, as in Kentucky, Iowa, Connecticut, and California (which states are exceptional to the English statute), to allow the jury in such cases to award punitive and exemplary damages." It is to be observed, however, that the Connecticut statute provides for the survival of the original cause of action; that the Kentucky stat-

however, the jury are not confined to the pecuniary loss, but may give damages for the loss of society, and by way of solace and comfort for the sorrow, suffering, and mental anguish occasioned by the death. In Alabama,[31] also, under the "Act to prevent homicides," a different rule seems to prevail. The general rule obtains also in states like Iowa,[32] Oregon,[33] and Washington,[34] where the measure of damages is the pecuniary injury to the estate.

EXEMPLARY DAMAGES.

128. Exemplary or punitive damages cannot be recovered, unless expressly authorized by statute.

It follows from the rule that damages must be assessed with reference to the pecuniary loss to the beneficiaries that exemplary or punitive damages cannot be given.[35] They are, however, ex-

ute expressly provides for punitive damages; and that in Iowa and California the damages are held to be limited to the pecuniary injury. Bertha Zinc Co. v. Black's Adm'r, 88 Va. 303, 13 S. E. 452; Simmons v. McConnell's Adm'r, 86 Va. 494, 10 S. E. 838. See, also, Turner v. Railroad Co. (W. Va.) 22 S. E. 83.

[31] Savannah & M. R. Co. v. Shearer, 58 Ala. 672; South & North Alabama R. Co. v. Sullivan, 59 Ala. 272. See East Tennessee, V. & G. R. Co. v. King, 81 Ala. 177, 2 South. 152. The act provides for the recovery of "such damages as the jury may assess." Code Ala. § 2589. The court has said that the purpose of the act is a prevention of homicide, and that this purpose it accomplishes by such pecuniary mulct as the jury deem just. Richmond & D. R. Co. v. Freeman, 97 Ala. 289, 11 South. 800.

[32] Donaldson v. Railroad Co., 18 Iowa, 280; Kelley v. Railroad Co., 48 Fed. 663.

[33] Holmes v. Railway Co., 5 Fed. 523; Carlson v. Railway Co., 21 Or. 450, 28 Pac. 497; Ladd v. Foster, 31 Fed. 827.

[34] Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991.

[35] See cases cited in note 24, supra, and note 44, infra. See, also, Atrops v. Costello, 3 Wash. 149, 35 Pac. 620. Rev. St. Mo. 1889, §§ 4426, 4427, authorizing the jury to give such damages, not exceeding $5,000, as they may deem fair, looking to the necessary injury to the survivors and the circumstances of the wrongful act, permits exemplary damages when such act was wanton or malicious. Haehl v. Railroad Co., 119 Mo. 325, 24 S. W. 737. See, also, Kansas City, M. & B. R. Co. v. Sanders, 98 Ala. 293, 13 South. 57; Richmond & D. R. Co. v. Freeman, 97 Ala. 289, 11 South. 800.

pressly authorized by the acts of Arizona, Kentucky, Missouri, Nevada, Texas, and Washington. In Connecticut,[36] where the right of action of the party injured survives; in Tennessee,[37] under the peculiar statutes of that state; and in Alabama,[38] under the "Act to prevent homicides,"—they may be given. It seems that they may also be given in Virginia,[39] under the anomalous construction there adopted. But, even where exemplary damages are authorized, they are not to be given in every case where a recovery of pecuniary damages would be proper.[40] Thus, in Kentucky,[41] the statute confines them to cases of "willful neglect"; and in Arizona and Texas [42] to cases of "willful act or omission or gross negligence of

[36] Murphy v. Railroad Co., 29 Conn. 496.

[37] Haley v. Railroad Co., 7 Baxt. 239; Kansas City, Ft. S. & M. R. Co. v. Daughtry, 88 Tenn. 721, 13 S. W. 689.

[38] See note 31, supra.

[39] Matthews v. Warner, 29 Grat. 570. And see note 30, supra.

[40] Under the statute which provides that the jury may give such damages, "pecuniary and exemplary," as may to them seem just, damages resulting from the negligence of defendant, free from moral or legal wrong amounting to willfulness, are limited to actual pecuniary loss. Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991.

[41] Gen. St. Ky. c. 57, § 3. Punitive damages may, but need not, be given. It is error to instruct the jury that they ought to award punitive damages. Kentucky Cent. R. Co. v. Gastineau's Adm'r, 83 Ky. 119; Louisville & N. R. Co. v. Brooks' Adm'x, Id. 129. See, also, Chiles v. Drake, 2 Metc. (Ky.) 146; Louisville, C. & L. R. Co. v. Mahony's Adm'x, 7 Bush, 235. Where a brakeman was killed by the willful negligence of a railroad company, a verdict of $10,000 held not so excessive as to indicate that the jury were influenced by passion or prejudice. Louisville & N. R. Co. v. Brooks' Adm'x, 83 Ky. 129. A verdict of $15,000 is not excessive for the death of a healthy and intelligent young man, 29 years old, who was earning $2.50 a day, and who was considered one of the best workmen in the company's service. Louisville & N. R. Co. v. Shivell's Adm'r (Ky.) 18 S. W. 944.

[42] Sayles' Civ. St. art. 2901. This section is based on Const. art. 16, § 26. The earlier constitutional provision (Const. 1869, art. 12, § 30) did not contain the words "gross neglect." See Houston & T. C. Ry. Co. v. Baker, 57 Tex. 419. The constitutional provisions did not repeal the earlier act, but gave the right to exemplary damages, in the cases named, in addition to compensatory damages. March v. Walker, 48 Tex. 372; Houston & T. C. Ry. Co. v. Moore, 49 Tex. 31; Cohen v. Railroad Co., 2 Woods, 346, Fed. Cas. No. 2,506; Houston & T. C. Ry. Co. v. Bradley, 45 Tex. 171. Where both actual and ex-

the defendant." In Missouri [43] they cannot be given unless there are "aggravating circumstances."

NO DAMAGES FOR INJURY TO DECEASED.

129. Damages cannot be recovered on account of the physical or mental suffering or other injury to the deceased.

Inasmuch as these acts do not transfer the right of action of the party injured to his personal representative, but give a new right of action, in which the damages are to be assessed with reference to the injury resulting from the death to the beneficiaries, nothing

emplary damages are sought, the allegations should be in the nature of two distinct counts. Galveston, H. & S. A. R. Co. v. Le Gierse, 51 Tex. 189.

[43] Rev. St. Mo. § 4427, provides that the jury may give such damages, not exceeding $5,000, as they may deem fair and just, with reference to the necessary injury resulting from such death, and also having regard to the mitigating or aggravating circumstances attending the wrongful act. Owen v. Brockschmidt, 54 Mo. 285; Gray v. McDonald, 104 Mo. 303, 16 S. W. 398. What circumstances will mitigate or aggravate is a question of law, and, if any such exist, they should be pointed out by proper instructions. Rains v. Railway Co., 71 Mo. 164; Nichols v. Winfrey, 79 Mo. 544. A general instruction that the jury should have regard to the mitigating and aggravating circumstances is bad, but, if there are no mitigating circumstances, the defendant cannot complain of the instruction for its generality. Nagel v. Railway Co., 75 Mo. 653; Smith v. Railway Co., 92 Mo. 360, 4 S. W. 129. Such an instruction is erroneous where there are no aggravating circumstances. Stoher v. Railway Co., 91 Mo. 509, 4 S. W. 389; Parsons v. Railway Co., 94 Mo. 286, 6 S. W. 464. Evidence of contributory negligence will not justify an instruction based on mitigating circumstances. McGowan v. Steel Co. (Mo. Sup.) 16 S. W. 236. See Foppiano v. Baker, 3 Mo. App. 560, Append. Where there are no aggravating circumstances, evidence of the financial condition of defendant is inadmissible. Morgan v. Durfee, 69 Mo. 469. Rev. St. Mo. § 4425, provides for the forfeiture and payment of $5,000 absolutely in certain cases. Under this section, if plaintiff is entitled to recover at all, he is entitled to recover for the full sum,—$5,000. Mangan v. Foley, 33 Mo. App. 250. Where the liability arises under section 4425, Rev. St., an instruction that the jury cannot take into consideration the anguish or suffering of the deceased or of the plaintiff is properly refused. Tobin v. Railway Co. (Mo. Sup.) 18 S. W. 996. The sum is not intended as a penalty, but as compensatory damages liquidated by the statute. Coover v. Moore, 31 Mo. 574.

can be allowed on account of the physical or mental suffering, or other injury, to the deceased.[44] The rule is, of course, otherwise under the acts of Connecticut, where the original right of action survives,[45] and in New Hampshire, Tennessee,[46] and New Bruns-

[44] Blake v. Railway Co., 18 Q. B. 93, 21 Law J. Q. B. 233; Illinois Cent. R. Co. v. Barron, 5 Wall. 90; Railroad Co. v. Whitton, 13 Wall. 270; Donaldson v. Railroad Co., 18 Iowa, 280; Dwyer v. Railway Co., 84 Iowa, 479, 51 N. W. 244; Kelley v. Railroad Co., 48 Fed. 663; Kansas Pac. Ry. Co. v. Cutter, 19 Kan. 83; Oldfield v. Railroad Co., 14 N. Y. 310; Whitford v. Railroad Co., 23 N. Y. 465, 469; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; Brady v. Chicago, 4 Biss. 448, Fed. Cas. No. 1,796; Southern Cotton P. & M. Co. v. Bradley, 52 Tex. 587; Potter v. Railway Co., 21 Wis. 372; and cases cited in note 24, supra.

[45] Gen. St. Conn. §§ 1008, 1009. The measure of damages appears to be the same as if the action had been brought by the party injured, including punitive damages. Murphy v. Railroad Co., 29 Conn. 496, 30 Conn. 184. Such seems also to have been the measure of damages under Acts 1853, c. 74 (Gen. St. Conn. 1866, tit. 7, c. 7, § 544), which is not found in Gen. St. Conn. 1888. Goodsell v. Railroad Co., 33 Conn. 51; Waldo v. Goodsell, 33 Conn. 432. See Lamphear v. Buckingham, Id. 237; Carey v. Day, 36 Conn. 152.

[46] Code Tenn. § 3134, provides that the plaintiff may recover for the mental and physical suffering, loss of time and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose benefit the action survives from the death. This section is Acts 1883, c. 186. Before this act, only such damages were recoverable as the deceased might have recovered if he had lived (Nashville & C. R. Co. v. Smith, 9 Lea, 471; East Tennessee, V. & G. R. Co. v. Toppins, 10 Lea, 58; Louisville & N. R. Co. v. Conley, Id. 531; Chicago, St. L. & N. O. R. Co. v. Pounds, 11 Lea, 130; Trafford v. Express Co., 8 Lea, 96; East Tennessee, V. & G. R. Co. v. Gurley, 12 Lea, 46), though the earlier cases had held that damages for the loss caused by the death were also recoverable (Nashville & C. R. Co. v. Prince, 2 Heisk. 580; Nashville & C. R. Co. v. Smith, 6 Heisk. 174; Nashville & C. R. Co. v. Stevens, 9 Heisk. 12; Collins v. Railroad Co., Id. 841; Railroad Co. v. Mitchell, 11 Heisk. 400). Cf. Louisville & N. R. Co. v. Burke, 6 Cold. 45. Contributory negligence of deceased may be shown in mitigation of damages. Louisville & N. R. Co. v. Burke, 6 Cold. 45; Nashville & C. R. Co. v. Smith, 6 Heisk. 174; Louisville & N. R. Co. v. Howard, 90 Tenn. 144, 19 S. W. 116. Deceased was 57 years old, in declining health. His monthly earnings were $25, and his sufferings had not been extreme. The negligence of defendant was not gross, and there was evidence of contributory negligence. *Held*, that a verdict of $12,000 was excessive. Snodgrass, J., said: "The principal inquiry is not what is the value of the life taken. It is whether, and how much, negligence was displayed in taking it, and wheth-

wick, where the statutes authorize the jury to consider the suffering of the deceased.

MEDICAL AND FUNERAL EXPENSES.

130. It is generally, but not universally, held that compensation may be recovered for medical and funeral expenses.

Since the damages are based solely upon the injury which results from the death, it would logically follow that the expenses of nursing, medical attendance, etc., which result, not from the death, but from the injury causing it, cannot be recovered. It has been frequently held, however, in actions by parents for the death of minor children, that these expenses may be included.[47] As to funeral expenses, it has been held in England that they cannot be included.[48] "The subject-matter of the statute," says Willes, J., in Dalton v. South Eastern R. Co., "is compensation for injury by reason of the relative not being alive." In that case the action was for the benefit of a father on account of the death of a minor son, and the ver-

er, and to what extent, the negligence of the deceased caused or contributed to it, and, from the reasonable and just compensation to be given upon determining the first inquiry against the negligent wrongdoer, what amount should be deducted on account of the contributing default of the deceased." Louisville & N. R. Co. v. Stacker, 86 Tenn. 343, 6 S. W. 734. On the other hand, $8,000 damages for the death of a man earning $4 a day, of industrious and sober habits, with an expectation of life of 31 years, has been held not excessive. Tennessee Coal & R. Co. v. Roddy, 85 Tenn. 400, 5 S. W. 286. And where deceased was careful, and the defendant's engineer was very reckless, it was held that a verdict for $15,000 would not be disturbed. Chesapeake, O. & S. W. R. Co. v. Hendricks, 88 Tenn. 710, 13 S. W. 696, 14 S. W. 488.

[47] Little Rock & F. S. Ry. Co. v. Barker, 33 Ark. 350; Pennsylvania Co. v. Lilly, 73 Ind. 252; Rains v. Railway Co., 71 Mo. 164; Roeder v. Ormsby, 13 Abb. Prac. 334, 22 How. Prac. 270; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Pennsylvania R. Co. v. Bantom, 54 Pa. St. 495; Cleveland & P. R. Co. v. Rowan, 66 Pa. St. 393; Lehigh Iron Co. v. Rupp, 100 Pa. St. 95; Galveston v. Barbour, 62 Tex. 172; Brunswig v. White, 70 Tex. 504, 8 S. W. 85. Holland v. Brown, 35 Fed. 43, contra.

[48] Dalton v. Railroad Co., 4 C. B. (N. S.) 296, 4 Jur. (N. S.) 711, 27 Law J. C. P. 227. See Boulter v. Webster, 13 Wkly. Rep. 289.

dict was reduced by the amount of the funeral and mourning expenses which the father had paid. In the United States funeral expenses are generally held to be a legitimate element of damages, at least when paid by one of the beneficiaries who was under obligation to pay them.[49] The Minnesota act provides that, out of the money recovered, "any demand for the support of the deceased, and funeral expenses, duly allowed by the probate court, shall be first deducted and paid."[50]

MEANING OF "PECUNIARY."

131. The term "pecuniary losses" is used in the sense of material, as distinguished from sentimental, losses.

The use of "pecuniary" to designate the kind of loss for which recovery can be had is misleading, for the damages are by no means confined to the loss of money, or of what can be estimated in money. As will be seen, damages are recoverable for the loss of the services of husband, wife, and child, and also for the loss by a child of the care, education, and counsel which he might have received from his parents. The word has been used rather for the purpose of excluding from the recovery damages to the feelings and affections than of confining the damages strictly to those injuries which are "pecuniary," according to the ordinary definition. As was observed by Denio, J., in Tilley v. Railroad Co.:[51] "The word 'pecuniary' was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though painful and grievous to be borne, cannot be measured or

[49] Owen v. Brockschmidt, 54 Mo. 285; Murphy v. Railroad Co., 88 N. Y. 445 (affirming Id., 25 Hun, 311); Petrie v. Railroad Co., 29 S. C. 303, 7 S. E. 515; and cases cited in note 47, supra. In Holland v. Brown, supra, it was held that they did not result from the death. In Gay v. Winter, 34 Cal. 153, it was held that if recoverable they must be specially pleaded. See Bunyea v. Railroad Co., 19 D. C. 76. Husband may recover funeral expenses of wife. Gulf, C. & S. F. R. Co. v. Southwick (Tex. Civ. App.) 30 S. W. 592.

[50] This does not make the fund subject to all debts incurred by the deceased for the support of himself and family, but only to such as were incurred in consequence of, or after, the injury. State v. Probate Court of Dakota County, 51 Minn. 211, 53 N. W. 463.

[51] 21 N. Y. 471; 29 N. Y. 252.

recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of value." The meaning would be better expressed by "material," as was suggested by Patterson, J. A., in an opinion in which he carefully reviews all the English decisions.[52] The construction placed upon the word by the courts can only be ascertained by an examination of the various rules which have been evolved for measuring the damages, and which differ, according as the action is brought for the benefit of husband, wife, minor child, or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.

PROSPECTIVE PECUNIARY LOSSES.

132. Damages may be recovered for the loss of prospective benefits:

(a) Which plaintiff is legally entitled to receive, including:

(1) Future care and support; and

(2) Future services.

(b) Which it is reasonably probable plaintiff would have received, including:

(1) Prospective gifts; and

(2) Prospective inheritance.

The loss which a man suffers by the death of a relative may be the loss of something which he was legally entitled to receive, or may be the loss of something which it was merely reasonably probable he would receive. The first description of loss is principally [53]

[52] Lett v. Railway Co., 11 Ont. App. 1; Patt. Ry. Acc. Law, § 401.

[53] But not exclusively. Thus where the deceased had covenanted to pay his mother an annuity during their joint lives, this, of course, furnished a basis for damages. Rowley v. Railway Co., L. R. 8 Exch. 221, 42 Law J. Exch. 153, 29 Law T. (N. S.) 180. And, where the deceased was a child of 8, and his mother lost by his death a pension of $2 a month, which under the

confined to a husband's loss of his wife's services, a wife's loss of her husband's support, a parent's loss of the services of a minor child, a minor child's loss of the support of a parent. But the statutes do not confine the benefit of the action to husbands, wives, minor children, and parents of minor children; and hence a person entitled to the benefit of the action may recover damages for the loss of a pecuniary benefit to which he was not legally entitled, but which it is reasonably probable he would have received except for the death. The second description of loss includes the loss by the beneficiary of any pecuniary benefit which he might reasonably have expected to receive during the lifetime of the deceased by gift, and also the loss of any accumulations which it is probable that the deceased would have added to his estate had he lived out his natural life, and which the beneficiary would probably have received by inheritance. Thus the second description of loss may be divided into (1) losses of prospective gifts, and (2) losses of prospective inheritances. The loss sustained by a husband, wife, minor child, and parent of a minor child may be of both descriptions. The loss sustained by an adult child, parent of an adult child, or collateral relative can only be of the latter description.

SAME—FUTURE CARE AND SUPPORT.

133. The damages recoverable by a wife or minor child for loss of the care and support of a husband or father is measured by the amount which the deceased would probably have earned during his life for their benefit.

The pecuniary loss which a wife sustains by the death of a husband, and which a minor child sustains by the death of a father, necessarily includes the loss of support which the deceased owed them respectively.[54] The measure of damages is the amount which the deceased would probably have earned during his life for their

pension laws she drew on his account, it was held that she could recover damages on account of its loss. Ewen v. Railway Co., 38 Wis. 613.

[54] Illinois Cent. R. Co. v. Welden, 52 Ill. 290; Chicago, R. I. & P. R. Co. v. Austin, 69 Ill. 426; Chicago & A. R. Co. v. May, 108 Ill. 288.

benefit, taking into consideration his age, ability, and disposition to work, and habits of living and expenditure.[55] To this may, of course, be added, as in other cases, the amount which he would probably have accumulated, and which they might reasonably have expected to inherit.[56] The damages to the widow should be calculated upon the basis of their joint lives; the damages to the minor children, for the loss of support, should be confined to their minority.[57] It seems that the pecuniary value of the support of the head

[55] Pennsylvania R. Co. v. Butler, 57 Pa. St. 335; Pennsylvania Tel. Co. v. Varnau (Pa. Sup.) 15 Atl. 624; Hudson v. Houser, 123 Ind. 309, 24 N. E. 243; Baltimore & O. R. Co. v. State, 24 Ind. 271. Schaub v. Railroad Co., 106 Mo. 74, 16 S. W. 924; Hogue v. Railroad Co., 32 Fed. 365; Shaber v. Railway Co., 28 Minn. 103, 9 N. W. 575; Bolinger v. Railroad Co., 36 Minn. 418, 31 N. W. 856; Burton v. Railroad Co., 82 N. C. 504, 84 N. C. 192; Blackwell v. Railroad Co., 111 N. C. 151, 16 S. E. 12; Pool v. Southern Pac. Co., 7 Utah, 303, 26 Pac. 654; Wells v. Railway Co., 7 Utah, 482, 27 Pac. 688; Baltimore & O. R. Co. v. Wightman, 29 Grat. 431. Soyer v. Water Co., 15 Mont. 1, 37 Pac. 838; St. Louis, I. M. & S. Ry. Co. v. Sweet, 60 Ark. 550, 31 S. W. 571. Opportunities of acquiring wealth by change of circumstances in life are not to be considered. Mansfield Coal & Coke Co. v. McEnery, 91 Pa. St. 185; Atlanta & W. P. Ry. Co. v. Newton, 85 Ga. 517, 11 S. E. 776. See Christian v. Railway Co., 90 Ga. 124, 15 S. E. 701. Deceased was a fireman, and evidence was introduced to prove that firemen on defendant's road, when they had acquired sufficient experience and skill, were sometimes promoted to be engineers at increased wages. *Held* that, as it was not shown that deceased possessed the skill to be an engineer, the admission was error. Brown v. Railroad Co., 64 Iowa, 652, 21 N. W. 193. The court refused to charge that, if deceased was largely indebted, the plaintiff would have no pecuniary interest in his life until his debts were paid, and that the jury must fix a period when he would have acquired property beyond his debts. Held no error. Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315. But in Texas it is held that it is proper to show what were the deceased's chances of promotion. St. Louis, A. & T. Ry. Co. v. Johnston, 78 Tex. 536, 15 S. W. 104; Texas & P. Ry. Co. v. Robertson, 82 Tex. 657, 17 S. W. 1041; Gulf, C. & S. F. Ry. Co. v. John (Tex. Civ. App.) 29 S. W. 558. And that the standard is not to be fixed by what he was earning when he died. International & G. N. R. Co. v. Ormond, 64 Tex. 485; East Line & R. R. Ry. Co. v. Smith, 65 Tex. 167.

[56] Lake Erie & W. R. Co. v. Mugg, 132 Ind. 168, 31 N. E. 564; Catawissa R. Co. v. Armstrong, 52 Pa. St. 282; Castello v. Landwehr, 28 Wis. 522; Lawson v. Railway Co., 64 Wis. 447, 24 N. W. 618. See post, p. 334.

[57] The court charged that the jury should estimate the reasonable probabilities of the life of deceased, and give plaintiffs such pecuniary damages as

of a family cannot be limited to the amount of his wages earned for the benefit of his family, but that his daily services, attention, and care on their behalf may be considered.[58] The testimony in such cases, as also in actions for the death of a minor child, necessarily takes a wider range than when the question is simply whether the beneficiaries have suffered a pecuniary loss, in a strict sense.[59] Provided that it appears that the deceased was apparently able to provide for the support of his family, the court will be slow to set aside a verdict for lack of exact proof.[60] Thus, it is not essential

they had suffered, or would suffer, as the direct consequence of deceased's death; that for the children these prospective damages should be estimated to their majority, "and as to the widow, to such probability of life as the jury may find reasonable." *Held*, that this was correct, and, no objection being made to the part relating to the widow, it would be assumed that it was understood by the jury as meaning the probable duration of the joint lives of herself and her husband. Baltimore & R. Turnpike Road v. State, 71 Md. 573, 18 Atl. 884; Baltimore & O. R. Co. v. State, 33 Md. 542; Baltimore & O. R. Co. v. State, 41 Md. 268; Duval v. Hunt, 34 Fla. 85, 15 South. 876.

[58] Bolinger v. Railroad Co., 36 Minn. 418, 31 N. W. 856.

[59] Staal v. Railroad Co., 57 Mich. 239, 23 N. W. 795. Testimony as to the household and living expenses of decedent's family, by one who had kept the accounts, is competent to show the loss to decedent's family because of his death. Hudson v. Houser, 123 Ind. 309, 24 N. E. 243. Evidence that deceased had been in the habit of turning his wages over to his wife was properly admitted for the purpose of showing the loss sustained by deceased's family. Lake Erie & W. R. Co. v. Mugg, 132 Ind. 168, 31 N. E. 564. As having reference to the question of the reasonable expectation of pecuniary benefit to the widow, an instruction to the jury that they might consider his capacity to earn money, the injury to his business, his health, and general condition in life, as disclosed by the evidence, is not erroneous. Clapp v. Railway Co., 36 Minn. 6, 29 N. W. 310. Evidence showing what property deceased had when he came to the state 20 years before, what occupation he had followed, how much he had accumulated, and what he was worth at the time of his death, *held* admissible. Phelps v. Railroad Co., 37 Minn. 485, 35 N. W. 273.

[60] Deceased left a wife and three children, two of them minors. He was a strong, healthy man, 48 years old, accustomed to earn good wages as a day laborer. *Held*, that a verdict of $5,000 was not clearly excessive. Bolinger v. Railroad Co., 36 Minn. 418, 31 N. W. 856. The deceased was a laboring man, sober and industrious, who provided for his family as best he could under the circumstances, and was 36 years old. He left a widow and six young children. *Held*, that a verdict of $5,000 was not excessive. Board

that the deceased should have been actually earning wages at the time of his death;[61] but, in default of such proof, the amount of the verdict will doubtless be more carefully scrutinized.[62] The amount of verdict which will be sustained differs considerably in different jurisdictions.[63]

Com'rs Howard Co. v. Legg, 110 Ind. 479, 11 N. E. 612. The deceased was the head of a family, 39 years old, able to perform the duties of fireman, and always at work. *Held*, that the jury were authorized to find more than nominal damages, and that a verdict of $3,500 was not excessive. Smith v. Railroad Co., 92 Mo. 364, 4 S. W. 129.

[61] Evidence was given of the age, habits, health, and occupation of the deceased, and of the condition of his family, etc., but there was no evidence of the specific wages paid him at the time of his death. *Held*, that the jury were not confined to nominal damages. Baltimore & O. R. Co. v. State, 24 Md. 271. Averments showing that deceased was a laboring man, working for defendant (without alleging that he was receiving any compensation for his labor) and that he left no widow, but left a child three years old, *held*, on demurrer, to show sufficiently that such child suffered pecuniary damage by the father's death. Kelley v. Railway Co., 50 Wis. 381, 7 N. W. 291.

[62] The deceased was a common laborer, who left a widow and several minor children, but what wages he received was not shown. *Held*, that a verdict of $5,000 was excessive, in view of the absence of evidence that he earned annually so much as the interest on one half that sum. Illinois Cent. R. Co. v. Welden, 52 Ill. 290.

[63] Deceased earned $1 a day, which he always brought home and spent on his wife. The probable duration of his life was 27 years. *Held*, that a verdict of $2,500 should be reduced to $1,650. Louisville & N. R. Co. v. Trammell, 93 Ala. 350, 9 South. 870. Deceased was 31 years old, sober and industrious, a druggist, but at the time of his death was laying rails at $2.50 a day. In an action by the widow, *held* that $5,000 was not excessive. Dallas & W. Ry. Co. v. Spicker, 61 Tex. 427. A verdict of $10,000 will not be set aside as excessive, in view of testimony that deceased was a "stout, healthy, and sober" laborer, about 35 years old, earning $1.25 a day, and that he left a widow and two infant children. Missouri Pac. Ry. Co. v. Lehmberg, 75 Tex. 61, 12 S. W. 838. Where the average wages of the deceased were $125 per month, *held* that a verdict of $5,000 each in favor of the widow and seven year old daughter, respectively, was not excessive. St. Louis, A. & T. Ry. Co. v. Johnston, 78 Tex. 536, 15 S. W. 104. The deceased was a healthy and robust man 29 years old, an engineer, and earning $125 a month. *Held*, that a verdict in favor of his wife for $10,000 was not excessive. Texas & P. Ry. Co. v. Geiger, 79 Tex. 13, 15 S. W. 214. Where plaintiff's husband was a healthy man, 55 years old, who earned from $500 to $1,200 a year, and who had always supported plaintiff, a verdict for $6,250 actual damages *held* not

Action by Widow—Evidence of Number of Children.

Where the children are included among the beneficiaries, as is the case under most statutes, evidence of their number and ages is, of course, necessary.[64] Where, however, the action is to be brought by the widow in her own name, the question arises whether such evidence is proper. In Pennsylvania, where the widow sues for the benefit of the children, as well as of herself, and the declaration must state who are the parties entitled, such evidence is required.[65] In Missouri, on the other hand, and in some other states, the action, when brought by the widow, is for her sole benefit. It is held, nevertheless, that, as the burden of supporting minor children is imposed upon her, evidence of their number and ages is admissible to show the extent of the burden cast upon her by the death.[66] So, in Wisconsin, although the action is for the sole benefit of the widow, and hence an instruction that damages may be allowed to the widow and children is erroneous,[67] the fact that the deceased left children who will be dependent on her may be considered in estimating her damages.[68]

excessive. Paschal v. Owen, 77 Tex. 583, 14 S. W. 203. Deceased was 33 years old, in good health, earning $14 a week 7 months in the year. *Held*, in a suit for wife and five children, that $6,000 was not excessive. Byrd v. Corner, 6 Chi. Leg. N. 364. Deceased was insolvent and in failing health, but able to superintend his business as innkeeper. Verdict of $4,000 apportioned among his children *held* excessive. Hutton v. Windsor, 34 U. C. Q. B. 487. In suit for wife and children, £3,000 *held* not excessive. Secord v. Railway Co., 15 U. C. Q. B. 631. In suit for wife and children, £5,000 *held* excessive. Morley v. Railroad Co., 16 U. C. Q. B. 504.

[64] Breckenfelder v. Railway Co., 79 Mich. 560, 4 N. W. 957. See section 80.

[65] Huntingdon & B. T. R. Co. v. Decker, 84 Pa. St. 419.

[66] Tetherow v. Railway Co., 98 Mo. 74, 11 S. W. 310; Soeder v. Railway Co., 100 Mo. 673, 13 S. W. 714; Atchison, T. & S. F. R. Co. v. Wilson, 1 C. C. A. 25, 48 Fed. 57. Under Rev. St. 1889, § 4425, such evidence is, of course, improper. Schlereth v. Railroad Co. (Mo. Sup.) 19 S. W. 1134.

[67] Schadewald v. Railway Co., 55 Wis. 569, 13 N. W. 458; Liermann v. Railway Co., 82 Wis. 286, 52 N. W. 91. It is error to direct the jury to give damages to recompense the estate of deceased, for such instruction in effect directs them to compensate the children as well as the widow. Gores v. Graff, 77 Wis. 174, 46 N. W. 48.

[68] Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. 565; Abbot v. McCadden, 81 Wis. 563, 51 N. W. 1079.

Death of Parent of Minor—Loss of Education and Personal Training.

The damages for loss of support suffered by a minor child include the loss of such comforts, conveniences, and also of such education as the parent might have been expected to bestow upon him. In Pym v. Railway Co.,[69] Cockburn, C. J., said: "We are of opinion that, as the benefit of education, and the enjoyment of the greater comforts and conveniences of life, depend on the possession of pecuniary means to procure them, the loss of these advantages is one which is capable of being estimated in money,—in other words, is a pecuniary loss,—and therefore the loss of such advantages arising from the death of a father whose income ceases with his life is an injury in respect of which an action can be maintained on the statute." It has frequently been held, however, that damages are not confined to the loss of such education as is procurable only by pecuniary means, but that they may be given for the loss of the personal care, training, and instruction of a parent, and even of a mother, where the father still survives.[70] A leading case on this subject is Tilley v. Hudson River R. Co.,[71] which was an action brought by a father as administrator for the benefit of children for the death of their mother. On the first appeal it was held that the value of the mother's earnings, and the probability that the children would have received an estate increased by such earnings on the death and intestacy of the father, could not be considered; but, upon the second appeal, it was held that evidence of the mother's

[69] 2 Best & S. 759, 10 Wkly. Rep. 737, 31 Law J. Q. B. 249; affirmed, 4 Best & S. 396, 11 Wkly. Rep. 922, 32 Law J. Q. B. 377.

[70] Tilley v. Railroad Co., 24 N. Y. 471, 29 N. Y. 252; Howard County Com'rs v. Legg, 93 Ind. 523; Stoher v. Railway Co., 91 Mo. 509, 4 S. W. 389; Dimmey v. Railroad Co., 27 W. Va. 32; Searle's Adm'r v. Railway Co., 32 W. Va. 370, 9 S. E. 248; Baltimore & O. R. Co. v. Wightman, 29 Grat. 431; St. Louis, I. M. & S. Ry. Co. v. Maddry, 57 Ark. 306, 21 S. W. 472. In Illinois Cent. R. Co. v. Welden, 52 Ill. 290, it was held that while, on principle, an instruction that the jury might consider the loss of instruction and physical, moral, and intellectual training of the father was correct, it should not have been given, because there was no evidence tending to show that the deceased was fitted by education or by disposition to furnish it. Followed in Chicago, R. I. & P. R. Co. v. Austin, 69 Ill. 426. See, also, Baltimore & O. R. Co. v. Stanley, 54 Ill. App. 215; St. Louis, I. M. & S. Ry. Co. v. Sweet, 60 Ark. 550, 31 S. W. 571.

[71] Supra.

capacity to bestow upon her children such training, instruction, and education as would be pecuniarily serviceable to them was admissible, and that, as indicating such capacity on her part, it was not improper to admit evidence of her capacity to conduct business and save money. "It is certainly possible," said Hogeboom, J., "and not only so, but highly probable, that a mother's nurture, instruction, and training, if judiciously administered, will operate favorably upon the worldly prospects and pecuniary interests of the child. * * * If they acquire health, knowledge, and a sound bodily constitution, and ample intellectual development, under the judicious training and discipline of a competent and careful mother, it is very likely to tell favorably upon their pecuniary interests."

SAME—FUTURE SERVICES.

134. The damages recoverable by a husband for the death of his wife include the reasonable value of her services, less the cost of suitably maintaining her.

135. The damages recoverable by a parent for the death of a minor child include the value of the child's services during minority, less the cost of support.

Death of Wife—Loss of Service.

The pecuniary injury to a husband from the death of a wife necessarily includes the loss of her services, and the measure of damages is their reasonable value,[72] less the cost of suitably maintaining her.* Thus, in Whiton v. Chicago & N. W. Ry. Co.,[73] a case arising in the circuit court, under the Wisconsin statute, the plaintiff proved that his wife was a superior woman, as wife, mother, and

[72] Chicago & N. W. R. Co. v. Whitton, 13 Wall. 270; Whiton v. Railroad Co., 2 Biss. 282, Fed. Cas. No. 17,597; Chant v. Railway Co. (1866) Wkly. Notes, 134; Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329; Delaware, L. & W. R. Co. v. Jones, 128 Pa. St. 308, 18 Atl. 330; Lett v. Railway Co., 11 Ont. App. 1, reversing Id., 1 Ont. 548. Damages for the death of a wife must be based on the value of her services, and it is incumbent on the plaintiff to prove such services and their value. Nelson v. Railway Co. (Mich.) 62 N. W. 993.

* Gulf, C. & S. F. Ry. Co. v. Southwick (Tex. Civ. App.) 30 S. W. 592.

[73] Supra, note 72.

member of society. The court charged the jury (after stating that the damages were confined to the pecuniary loss; that it was impossible to lay down any fixed rule; and that the matter largely rested with the sound reason and discretion of the jury) that, taking all the facts and circumstances into consideration, they might consider the personal qualities, the ability to be useful, of the deceased, and also her capacity to earn money. The jury rendered a verdict of $5,000, which was held not to be excessive. The defendant having brought the case to the supreme court, the charge was approved, Mr Justice Field, who delivered the opinion, declaring it to be clear and explicit as to the character of the damages which the jury were authorized to consider. Proof that the deceased actually rendered services is not necessary, but may be inferred by the jury. Thus, in Chant v. South Eastern Ry. Co.,[74] which was an action by a gardener, owing to the fact that the plaintiff, the only witness, broke down in course of his examination, no evidence was given of the pecuniary loss, but the jury gave a verdict of £200. This was moved against in the exchequer chamber, on the ground that there was no evidence of pecuniary assistance; but the court thought that, in the absence of evidence to the contrary, it must be assumed that she was a person of average health, industry, and good character, and that to a poor man such a wife gave pecuniary assistance in keeping house, etc., and declined to grant a new trial. So, in Delaware, L. & W. R. Co. v. Jones,[75] the plaintiff introduced evidence to show that the deceased was 66 years old and had always been healthy, and rested. The court refused to rule that this evidence did not show a pecuniary loss, or that the plaintiff could only recover nominal damages; and in the supreme court the lower court was sustained, Sterrett, J., observing that the jury might infer that she was an ordinarily industrious and useful wife. In Pennsylvania R. Co. v. Goodman [76]

[74] Supra, note 72. But see Mitchell v. Railroad Co., 2 Hun, 535, where a verdict for $4,000 was set aside as unauthorized by the proof, the only pecuniary loss shown being what might be inferred from the fact that deceased was a married woman and aged 20.

[75] Supra, note 72.

[76] 62 Pa. St. 329. The court charged that damages should be given as a pecuniary compensation, the jury measuring the plaintiff's loss by a just esti-

it is said that the frugality, industry, usefulness, attention, and tender solicitude of a wife and the mother of children, inasmuch as they render her services more valuable than those of an ordinary servant, are elements which are not to be excluded from the jury in making their estimate of value.

Death of Minor Child—Loss of Service.

In an action for the benefit of a parent for the death of a minor child the damages necessarily include the loss of the child's services during minority,[77] and the measure of damages is the value of the services less the probable cost of support and maintenance.[78] It is not essential that the child should ever have earned anything. Thus, in Duckworth v. Johnson,[79] a father, who was a working man, sued for the death of a son 14 years of age, who had earned 4s. a week for a year or more, but who, at the time of his death, was without employment. There was no evidence of the cost of boarding and clothing him, and the judge left it to the jury to say whether the plaintiff had sustained any pecuniary loss by the death; and, the jury having found a verdict of £20, it was held that the plaintiff was

mate of the services and companionship of the wife; that is, by their value in a pecuniary sense, nothing being allowed for the plaintiff's wounded feelings. The charge was sustained, on the ground that "companionship" was evidently used to express the relation of the deceased in the character of the services performed.

[77] Little Rock & Ft. S. Ry. Co. v. Barker, 33 Ark. 350; Chicago v. Keefe, 114 Ill. 222, 2 N. E. 267; Illinois Cent. R. Co. v. Slater, 129 Ill. 91, 21 N. E. 575; McGovern v. Railroad Co., 67 N. Y. 417; Galveston v. Barbour, 62 Tex. 172; Rains v. Railway Co., 71 Mo. 164; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Caldwell v. Brown, 53 Pa. St. 453. A widowed mother may recover notwithstanding that she has no right to the services of a minor child, since the act gives her a right of action. Pennsylvania R. Co. v. Bantom, 54 Pa. St. 495. A parent may recover damages for the death of a minor child although the latter never contributed to the parent's support. Mollie Gibson Consol. Mining & Milling Co. v. Sharp, 5 Colo. App. 321, 38 Pac. 850.

[78] Rockford, R. I. & St. L. R. Co. v. Delaney, 82 Ill. 198; Rajnowski v. Railroad Co., 74 Mich. 15, 41 N. W. 817; Pennsylvania Co. v. Lilly, 73 Ind. 252; Brunswig v. White, 70 Tex. 504, 8 S. W. 85. The value of the services is to be without regard to any peculiar value which the parent might attach to them. St. Louis, I. M. & S. Ry. Co. v. Freeman, 36 Ark. 41.

[79] 4 Hurl. & N. 653, 29 L. J. Exch. 25, 5 Jur. (N. S.) 630.

entitled to retain it. In Bramall v. Lees [80] a father recovered £15 for the death of a daughter 12 years old, who had never actually earned anything, but who might, if she had lived, have obtained work in a factory. So, in Condon v. Railway Co.,[81] a widow recovered £10 for the death of a son of 14, who had never earned anything, but whose capabilities were valued at 6d. a day.

In no English case does it appear that damages have been given for the death of a child of such tender years as to be incapable of earning wages. But in the United States it is well settled that substantial damages may be recovered in such cases. Ihl v. Railway Co.[82] is a leading case in point. The action was brought for the death of a child three years old, and the verdict was $1,800. The court of appeals sustained the lower court in refusing to nonsuit the plaintiff, or to direct a verdict for nominal damages, for absence of proof of pecuniary damages to the next of kin. "It was within the province of the jury," said Rapallo, J., "who had before them the parents, their position in life, the occupation of the father, and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury, present or prospective, resulting to the next of kin. Except in very rare instances, it would be im-

[80] 29 L. T. 111. See Chapman v. Rothwell, 4 Jur. (N. S.) 1180, where Crompton, J., comments upon the case with approval.

[81] 16 Ir. Com. Law, 415. See Burke v. Railroad Co., 10 Cent. Law J. 48. In an action by a father for the death of his daughter, aged 10, it was proved that deceased lived with her parents, and was maintained by them, rendering services which enabled them to dispense with a servant. No evidence was given of the exact value of her services, or as to the cost of her maintenance. *Held*, that there was evidence for the jury, but a verdict for £150 should be reduced to £50. Wolfe v. Railway Co., 26 L. R. Ir. 548. The plaintiff's father and stepmother were killed simultaneously. An action for the loss of the father had been instituted in which £100 was obtained; but 1s. only was allocated to plaintiff, who sued in a second action for the death of her stepmother. The parties were in humble life. The stepmother earned 6s. a week besides her food, which earnings were applied to the support of the family. Plaintiff resided with her father and stepmother. For six months preceding the death she earned 5s. a week, but previously had not been able to work from weakness of health. *Held*, that a verdict in the former case was no bar; also that there was evidence of pecuniary loss sufficient to sustain the action. Johnston v. Railway Co., 26 L. R. Ir. 691.

[82] 47 N. Y. 317.

practicable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years; and to hold that, without such proof, the plaintiff could not recover, would, in effect, render the statute nugatory in most cases of this description. It cannot be said, as a matter of law, that there is no pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parents could have derived from his services had he lived. These calculations are for the jury, and any evidence on the subject beyond the age and sex of the child, the circumstances and condition in life of the parents, or other facts existing at the time of the death or trial, would necessarily be speculative and hypothetical, and would not aid the jury in arriving at a conclusion." He adds that the amount of damages could have been reviewed in the court below, but could not in the court of appeals; the only question for the higher court being whether any, or more than nominal, damages could be recovered.[83]

[83] In Lehman v. City of Brooklyn, 29 Barb. 234, a stricter construction of the statute was adopted. In that case Brown, J., held that a verdict of $1,500 for a child of four years was excessive, and forcibly states the argument against the allowance of substantial damages in such cases: "For the next ten years," he says, "had he lived, it may safely be said that he would have been a burden in place of a benefit, pecuniarily, to his parents. And for the next seven years after that, if educated to a profession or mercantile calling, or put to a trade, he would have done well—much better than the majority of lads—if he supported himself. During all this time he would have been exposed to disease and death. * * * The life of this little boy, however priceless may have been its value in other aspects, had no pecuniary value which the jury could justly estimate at $1,500. If the plaintiff recovered at all, the damages should have been nominal." But this decision is opposed to the decisions earlier and later. Indeed, in actions for the death of minor children, as in other actions under the statute, the New York courts have gone farther than those of any other state in yielding the question of damages to the discretion of the jury. Thus in Oldfield v. Railroad Co., 14 N. Y. 310, affirming 3 E. D. Smith, 103, which was an action for the death of a daughter six years old, the judge charged that the plaintiff could recover whatever pecuniary loss the next of kin (the mother) might be supposed to incur in consequence of the loss of the child, and qualified this by adding that the jury were to give what they should deem fair and just, with reference to the pecuniary injury resulting from the death. The judge also excluded all considerations arising from the suffering of the child or the anguish of the

In conformity with the views expressed in Ihl v. Forty-Second St. Ry. Co., it is established that the jury may infer the amount of loss from proof of the age, sex, and condition in life of the deceased child, and that testimony as to the value of the services is unneces-

parents, and confined the rule of damages exclusively to indemnification for a pecuniary loss. This instruction was sustained by the court of appeals, Wright, J., observing that it was only another way of instructing the jury that the damages were a sum which, in their opinion, taking into consideration all the circumstances of the case, would be the pecuniary loss to the next of kin. "This," he concludes, "was right, unless the statute limits the recovery to the actual loss proved at the trial. We think it does not." See Quin v. Moore, 15 N. Y. 432. In O'Mara v. Railroad Co., 38 N. Y. 445, the jury rendered a verdict of $1,500 for a boy 11 years old. The defendant moved for a new trial on the ground that there was no evidence of the pecuniary value of the life, which was denied, and in the court of appeals the lower court was sustained, Hunt, C. J., observing that the jury would have the right, acting upon their own knowledge, and without proof, to say that the services of a boy from 11 until 21 years of age were valuable to his father, and to estimate their value. The court went to the extreme length in Houghkirk v. Canal Co., 92 N. Y. 219; Id., 28 Hun, 407 (general term); Id., 11 Abb. N. C. 72, 63 How. Prac. 328 (special term),—in which case a verdict of $5,000 was rendered for an only child 6 years old, intelligent and healthy, the daughter of a market gardener,—these facts and the circumstance of her death constituting the only evidence. The general term declined to set the verdict aside as excessive, and the court of appeals declared that it was impossible to say that error had been committed thereby, although it granted a new trial on another ground. In the opinion of the court at general term the difficulty of any court called upon to review the damages in such cases is clearly set forth as follows: "The court in that case" [Ihl v. Railroad Co., 47 N. Y. 317], "says that the damages could be reviewed in this court. But the difficulty is, by what test are we to review them? If it is a matter of guess work, the jury can guess as well as we. If we are to review them by the test of the evidence, then the difficulty is that there is no direct evidence proving the amount of loss. The facts to which the consideration of the jury is limited by the case cited would be, in the present case, substantially and in brief: A girl of six years, healthy and bright, only child of a gardener and his wife, both of whom survived her. Given her death; what is their pecuniary loss?" Referring to the position taken by the general term, that the doctrine of the court of appeals leaves it impossible for a court to say in any instance that damages are excessive, Finch, J., who delivered the opinion of the court of appeals, says: "The damages to the next of kin * * * are necessarily indefinite, prospective, and contingent. They cannot be proved with even an approach to accuracy, and yet they are to be estimated and awarded, for the statute

sary,[84] though perhaps not improper.[85] It would seem, however, that such proof would not dispense with the necessity of evidence showing the expectancy of life of the parents.[86] It is said in some of the cases that where the deceased is a minor, and leaves a parent entitled to his services, the law presumes a loss for which more than nominal damages can be recovered.[87] Such damages may be en-

has so commanded. But even in such case there is, and there must be, some basis in the proof for the estimate, and that was given here, and always has been given. Human lives are not all of the same value to the survivors. The age and sex, the general health and intelligence, of the person killed, the situation and condition of the survivors, and their relation to the deceased, —these elements furnish some basis for judgment. That it is slender and inadequate is true; but it is all that is possible, and, while that should be given, more cannot be required. Upon that basis and from such proof the jury must judge; and, having done so, it is possible, though not entirely easy, for the general term to review such judgment, and set it aside if it appears excessive, or the result of sympathy and prejudice." In Ahern v. Steele, 48 Hun, 517, 1 N. Y. Supp. 257, in sustaining a verdict of $4,500 for a child of six, Van Brunt, P. J., remarked: "The damages appear to be excessive, as it does not seem that there can be any pecuniary damage resulting from the death of so young a child; * * * but as recoveries have been sustained, based on the death of much younger children, we see no reason for interference with the verdict upon this account." Gorham v. Railroad Co., 23 Hun, 449; Huerzeler v. Railroad Co., 1 Misc. Rep. 136, 20 N. Y. Supp. 676. But in Carpenter v. Railroad Co., 38 Hun, 116, it was held that a verdict could not be sustained on evidence merely of the relationship, age, and habits of the child, when there was no evidence of the condition, pecuniary and physical, of the parents or of their age. See, also, Gill v. Railroad Co., 37 Hun, 107; Birkett v. Ice Co., 110 N. Y. 504, 18 N. E. 108.

[84] Little Rock & F. S. Ry. Co. v. Barker, 39 Ark. 491; City of Chicago v. Major, 18 Ill. 349; City of Chicago v. Scholten, 75 Ill. 468; City of Chicago v. Hesing, 83 Ill. 204; Union Pac. Ry. Co. v. Dunden, 37 Kan. 1, 14 Pac. 501; Nagel v. Railway Co., 75 Mo. 653; Grogan v. Foundry Co., 87 Mo. 321; Brunswig v. White, 70 Tex. 504, 8 S. W. 85. Austin Rapid Transit Ry. Co. v. Cullen (Tex. Civ. App.) 29 S. W. 256.

[85] Rajnowski v. Railroad Co., 74 Mich. 15, 20, 41 N. W. 847, 849; Pennsylvania Coal Co. v. Nee (Pa. Sup.) 13 Atl. 841; Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315. See, also, Klanowski v. Railway Co., 57 Mich. 525, 24 N. W. 801.

[86] Carpenter v. Railroad Co., 38 Hun, 116.

[87] Where the next of kin are collateral kindred of the deceased, and have not received pecuniary aid from him, proof of such relationship will warrant a recovery of nominal damages only; but where the deceased is a minor, and

hanced by proof of the personal characteristics, capacity to render service, and habits of industry.[88] The jury may take into account the services which the child might reasonably have performed in the family, including acts of kindness and attention which would administer to the comfort of the family.[89] From the nature of the case, juries cannot be held to fixed and precise rules in estimating damages in case of the death of young children.[90] Nevertheless, as in other cases, the courts exercise their right to set aside and reduce excessive verdicts, though upon what principle the limit is determined it is often difficult to understand. The extent and character of the supervision exercised is illustrated in the cases collected in the subjoined note.[91]

leaves a father entitled to his services, the law presumes there has been a pecuniary loss. City of Chicago v. Scholten, 75 Ill. 468; City of Chicago v. Hesing, 83 Ill. 204; Bradley v. Sattler, 156 Ill. 603, 41 N. E. 171; Atrops v. Costello, 8 Wash. 149, 35 Pac. 620. Deceased was a brakeman over 20 years old, whose next of kin was a father, living in Germany. *Held*, that the plaintiff was entitled to more than nominal damages. The court says that while the measure of recovery would be affected by proof, or by the absence of it, of facts showing the value of the life to the survivors, the law presumes some value. Robel v. Railway Co., 35 Minn. 84, 27 N. W. 305. It is not competent for the defendant to prove that the child's services were of no value. Foppiano v. Baker, 3 Mo. App. 559.

[88] City of Chicago v. Scholten, 75 Ill. 468.

[89] Louisville, N. A. & C. Ry. Co. v. Rush, 127 Ind. 545, 26 N. E. 1010.

[90] Potter v. Railway Co., 22 Wis. 615; Ewen v. Railway Co., 38 Wis. 613.

[91] The mother was a widow, poor, and kept boarders. Deceased was a boy, an only child, healthy, intelligent, and obedient. The physician's bills and funeral expenses were $290. On the first trial the jury gave $4,500, which was set aside as excessive. Little Rock & F. S. Ry. Co. v. Barker, 33 Ark. 350. On the second trial the jury gave $3,500, of which the plaintiff remitted $1,235. *Held*, that a third trial would not be granted on the ground of excessive damages. Id. 39 Ark. 491. Deceased was a son six or seven years old. *Held*, that a verdict of $2,000 was not so excessive as to justify the court to interfere. Chicago & A. R. Co. v. Becker, 84 Ill. 483. Deceased was within 18 months of majority, and fitting herself to be a teacher, at the expense of her father. Her next of kin were her parents and a sister. *Held*, that these facts did not justify a verdict of $2,000, or more than nominal damages. Lake Shore & M. S. Ry. Co. v. Sunderland, 2 Ill. App. 307. Whether the damages were excessive is a question of fact which will not be reviewed in the supreme court. City of Joliet v. Weston, 123 Ill. 641, 14 N. E. 665; Id., 22 Ill. App. 225; City of Salem v. Harvey, 29 Ill. App. 483; Id., 129 Ill.

Same—Expectancy of Benefit after Majority.

Damages for the death of an adult child, as will be seen, are usually confined, except where they are based upon the loss of a prospective inheritance, to cases where the child has manifested his willingness to assist his parents by actually doing so. In ac-

344, 21 N. E. 1076. A judgment for $3,000 for a minor, who was 11 years and 8 months old, intelligent, healthy, and promising, and left surviving him a father, earning $700 or $800 a year as an engineer, and having a wife and 3 children, is not grossly excessive. Union Pac. Ry. Co. v. Dunden, 37 Kan. 1, 14 Pac. 501. Deceased was 18 years old, and was employed at $1.40 a day. His next of kin were a father and brother. *Held*, that a verdict of $3,400 was excessive, as it would realize a perpetual income equal to more than three quarters of his annual earnings. Chicago & N. W. R. Co. v. Bayfield, 37 Mich. 205. A verdict of $1,500 for a strong, healthy girl 11 years old, *held* not excessive. Cooper v. Railway Co., 66 Mich. 261, 33 N. W. 306. Deceased was 6 years old, in good health, and of ordinary intelligence and promise. His father and sole heir was working on a salary, and was 40 years old. The jury gave a verdict of $5,000, which the trial court reduced to $3,000. *Held*, that it should be set aside as excessive. Gunderson v. Elevator Co., 47 Minn. 161, 49 N. W. 694. Cf. O'Malley v. Railway Co., 43 Minn. 289, 45 N. W. 441. In Strutzel v. Railway Co., 47 Minn. 543, 50 N. W. 690, it was *held*, "though not without some hesitancy," that a verdict of $2,300 for a boy of 6 years old should not be disturbed. A verdict of $4,000 for a boy of 8 years *held* excessive, and reduced to $2,000. City of Vicksburg v. McLain, 67 Miss. 4, 6 South. 774. A verdict of $5,000 for a son 18 years old, employed as a brakeman, where there is no evidence of the amount of his earnings, and no aggravating circumstances exist, is excessive. Parsons v. Railway Co., 94 Mo. 286, 6 S. W. 464. A verdict of $2,250 for a son 18 years old, earning $50 a month, the expenses of sickness and funeral being $200, is excessive. Hickman v. Railway Co., 22 Mo. App. 344. A verdict of $1,846 for death of a boy 15 years old, strong, robust, and attentive to business, and already earning $4 a week, cannot be held excessive. Franke v. City of St. Louis, 110 Mo. 516, 19 S. W. 938. Verdicts of $936 and $1,056 for two sons, aged 13 and 15, respectively, *held* excessive. Telfer v. Railroad Co., 30 N. J. Law, 188. It was in evidence that the son was 14 years old when he was killed; that the average earning capacity of a lad from 14 to 21 years was from 75 to 90 cents a day; and that the expense of his maintenance was from 40 to 60 cents a day. *Held*, that $1,250 was not excessive damages. Pennsylvania Coal Co. v. Nee (Pa. Sup.) 13 Atl. 841. A verdict of $2,500 for a healthy five year old boy, with a fine mind, and well grown, kind, and dutiful, where the parents are poor, does not clearly show that the jury committed some palpable error, or totally mistook the rule of law, or were swayed by

cordance with the principle of these cases, it is held in Arkansas,[92] Maryland,[93] Michigan,[94] and Pennsylvania [95] that, in an action for the death of a minor child of tender years, damages are limited to the loss of service during the child's minority, and that the chances of his surviving his parents and of his ability and willingness to assist them after that period should be excluded from consideration. In Maryland [96] the same rule has been held to apply, although the minor is old enough to be self-supporting, and has actually contributed to the support of the parent; and the rule as declared in Pennsylvania would cover such a case.[97] But in Arkansas the rule does not apply where the minor has shown himself able and willing to make his own living, and to contribute to the

passion or prejudice, so as to warrant the court in setting it aside as excessive. Ross v. Railway Co., 44 Fed. 44. Deceased was a boy of eight, and his mother was in poor health, and dependent on friends, and lost by his death a pension of $2 a month. *Held*, that a verdict of $2,000 was not excessive. Ewen v. Railway Co., 38 Wis. 613. Deceased was a healthy boy, 16 months old, whose parents were poor and approaching middle life. *Held*, that a verdict of $1,000 was not excessive. Hoppe v. Railway Co., 61 Wis. 359, 21 N. W. 227. A verdict of $1,200 for a boy eight years old, whose parents were poor and had a large family, *held* not excessive. Strong v. City of Stevens Point, 62 Wis. 255, 22 N. W. 425. Deceased was seven years old. His father was poor, troubled with rheumatism, and sawed wood for a living, and his mother at times worked out. *Held*, that a verdict of $2,500 was not excessive. Johnson v. Railway Co., 64 Wis. 425, 25 N. W. 223. A verdict of $2,000 for a boy 18 months old *held* not excessive. Schrier v. Railway Co., 65 Wis. 457, 27 N. W. 167.

92 Little Rock & F. S. Ry. Co. v. Barker, 33 Ark. 350; St. Louis, I. M. & S. Ry. Co. v. Freeman, 36 Ark. 41.

93 State v. Baltimore & O. R. Co., 24 Md. 84.

94 Cooper v. Railway Co., 66 Mich. 261, 33 N. W. 306.

95 Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Caldwell v. Brown, 53 Pa. St. 453; Lehigh Iron Co. v. Rupp, 100 Pa. St. 95.

96 No expectation of pecuniary benefit to the father from the continuance of the life, after minority, of a son 19 years old, can be considered, although the son had been emancipated 2 years before his death, and had paid to his father the greater part of his earnings, and had promised to help him after becoming of age. Agricultural & M. Ass'n v. State, 71 Md. 86, 18 Atl. 37.

97 Lehigh Iron Co. v. Rupp, 100 Pa. St. 95.

support of his parents.[98] In Missouri and some other states the right of action is confined by the terms of the statute to the death of a minor child. In New York, Kansas,[99] Texas,[100] and Wisconsin, damages are not limited to the value of the services during minority.[101] In New York[102] the right of action, even in case of the death of an adult child or a collateral relative, is not confined to cases where there is evidence of past benefits upon which to base a reasonable probability of future benefits; and it is accordingly held that in an action for the death of a minor child the jury are not confined to a consideration of the benefits which would have resulted to the parents during minority, but may consider the probable, and even possible, benefits which might have resulted to them from his life, modified by the chances of failure and misfortune. In Wisconsin[103] it is held that the jury may take into consideration the reasonable expectation of pecuniary advantage that would have resulted from the child living beyond minority; but that it must be shown that the circumstances were such as to render it probable that the parents might need the services of the child, or aid from him, after majority; and that a sufficient foundation for such damages is laid by showing that the physical or pecuniary circumstances of the parents were such as to show that they might need such

[98] St. Louis, I. M. & S. Ry. Co. v. Davis, 55 Ark. 462, 18 S. W. 628.

[99] Missouri Pac. R. Co. v. Peregoy, 36 Kan. 424, 14 Pac. 7.

[100] Gulf, C. & S. F. Ry. Co. v. Compton, 75 Tex. 667, 13 S. W. 667; San Antonio St. Ry. Co. v. Mechler (Tex. Civ. App.) 29 S. W. 202. See Houston & T. C. R. Co. v. Nixon, 52 Tex. 19.

[101] In an action by the administrator for the death of a child 18 months old, owing to the fact that another action had been (erroneously) begun by the father to recover for the loss of services of the child during minority, only such damages were claimed as would accrue to the father or next of kin by reason of the loss of such pecuniary benefit as he might have received after the minority. A new trial was granted for error in the instructions, but the court intimates that the action might be maintained. Schetller v. Railway Co., 32 Minn. 518, 21 N. W. 711.

Although the father had given his time to the deceased (a minor son), the parents may recover more than nominal damages. St. Joseph & W. R. Co. v. Wheeler, 35 Kan. 185, 10 Pac. 461.

[102] Birkett v. Ice Co., 110 N. Y. 504, 18 N. E. 108.

[103] Potter v. Railroad Co., 22 Wis. 615, 21 Wis. 372. Cf. Seaman v. Trust Co., 15 Wis. 578.

services or aid. In Iowa [104] and Washington [105] two actions may be maintained,—one by the personal representative to recover damages to the estate for the loss of benefits that would have accrued after majority, and one by the parent for loss of services during minority.

SAME—PROSPECTIVE GIFTS.

136. Damages may be recovered for loss of prospective gifts which it is reasonably probable plaintiff would have received.

The cases in which, upon the facts, damages are recoverable for the loss of prospective gifts, are commonly actions by parents for the death of adult children, although cases also arise in which such damages may be recovered for the benefit of adult children on account of the death of a parent, or for the benefit of brothers and sisters and other collateral relatives. As has been said, such damages are not confined to cases of these descriptions, but may be recovered, where the facts furnish a proper basis, in addition to damages for loss of services, support, etc., in actions for the benefit of husbands, wives, minor children,[106] and, in some jurisdictions at least, of parents of minor children.

In order to lay a foundation for the recovery of damages for the loss of prospective gifts, it is usually held necessary, except in New York, for the plaintiff to show that the deceased, during his life, gave assistance to the beneficiaries, by way of money, services, or other material benefits, which, in reasonable probability, would have continued but for the death.[107]

Death of Adult Child.

Thus, in Dalton v. Railway Co.,[108] where it appeared that the plaintiff's son, who was 27 years old and unmarried, and lived away

[104] Walters v. Railroad Co., 36 Iowa, 458; Lawrence v. Birney, 40 Iowa, 377; Walters v. Railroad Co., 41 Iowa, 71; Benton v. Railroad Co., 55 Iowa, 496, 8 N. W. 330; Morris v. Railroad Co., 26 Fed. 22; Code, §§ 3732, 3761.

[105] Hedrick v. Navigation Co., 4 Wash. 400, 30 Pac. 714; 2 Hill's Ann. St. §§ 138, 139.

[106] Pym v. Railway Co., 2 Best & S. 759, 4 Best & S. 396.

[107] Cases cited in notes, infra.

[108] 4 C. B. (N. S.) 296, 4 Jur. (N. S.) 711, 27 Law J. C. P. 227.

from his parents, had in the last 7 or 8 years been in the habit of making them occasional presents of provisions and money, amounting to about £20 a year, it was held that the jury were warranted in inferring that the father had such a reasonable expectation of pecuniary benefit from his son's life as to entitle him to recover damages. And in Franklin v. Railway Co.,[109] it appeared that the father was old and infirm, and that the son, who was young and earning good wages, assisted him in some work, for which he was paid 3s. 6d. a week; and, the jury having found that the father had a reasonable expectation of benefit from the continuance of the son's life, it was held that the action was maintainable, although the verdict of £75 was excessive. In Sykes v. Railway Co.,[110] on the contrary, where the deceased was a bricklayer, and received from his father the wages of a skilled workman, and was of great assistance to his father, who was also a bricklayer, and who, owing to the loss of assistance from the deceased, could not take the contracts which he had done during his son's life, it was held that, inasmuch as the benefit which the father derived accrued, not from the relationship, but from a contract, and there was no evidence that he paid his son less than the usual wages, he had suffered no pecuniary loss from the death.[111]

The distinction taken in the English cases has generally been observed in the United States.[112] The proper measure of damages

[109] 3 Hurl. & N. 211, 4 Jur. (N. S.) 565. The plaintiff was 59 years old, nearly blind, injured in his leg and hands, and unable to work as formerly. Some 5 or 6 years before the death of his son, when the plaintiff was out of work for 6 months, the son had assisted the father pecuniarily, but had not done so since. *Held*, that there was evidence of pecuniary injury. Hetherington v. Railway Co., 9 Q. B. Div. 160.

[110] 44 Law J. C. P. 191, 32 Law T. (N. S.) 199, 23 Wkly. Rep. 473.

[111] The injury to the sons of deceased by the dissolution of a partnership between him and them cannot be considered. Demarest v. Little, 47 N. J. Law, 28.

[112] In an action for the benefit of a father for the death of an unmarried son 22 years of age, plaintiff can recover only by showing that deceased gave assistance to his father, contributed money to his support, or that the father had reasonable expectation of pecuniary benefit from the continued life of the son, the reasonable character of this expectation to appear from the facts in proof. In the absence of such proof, only nominal damages can be recovered. Fordyce v. McCants, 51 Ark. 509, 11 S. W. 691. A verdict of $10,000

is the present worth of the amount which it is reasonably probable the deceased would have contributed to the support of the parent during the latter's expectancy of life, in proportion to the amount he was contributing at the time of his death, not exceeding his

should be set aside, it appearing that the next of kin entitled to the benefit of the verdict was a mother in comfortable pecuniary circumstances, who had derived no profit from the earnings of her son, and was not likely to profit by his earnings had he lived. Atchison, T. & S. F. R. Co. v. Brown, 26 Kan. 443. The son lived apart from his parents, but was unmarried. No proof was offered of the parents' financial condition, or that they had ever received any actual pecuniary benefits from him during his lifetime; nor was there any evidence showing a reasonable probability of pecuniary advantage to them from the continuance of the son's life. *Held*, that no more than nominal damages should have been recovered. Cherokee & P. Coal & Min. Co. v. Limb, 47 Kan. 469, 28 Pac. 181. The deceased contributed to the support of his mother and invalid sister, but not of his other brothers and sisters. *Held*, that damages should be allowed only on account of the first two. Richmond v. Railway Co., 87 Mich. 374, 49 N. W. 621. Damages for the death of a son must be shown by evidence regarding the earnings of deceased and other circumstances, unless such evidence is not accessible. A verdict for $9,000, based on no evidence showing the value of deceased's life to plaintiff, set aside. Houston & T. C. Ry. Co. v. Cowser, 57 Tex. 293. The petition must show that the son supported plaintiff, or contributed to his support, or that there was some expectation of pecuniary benefit to be derived from deceased; and a mere allegation that plaintiff, "as his sole surviving parent, had been damaged $10,000 actual damages," is insufficient. Winnt v. Railway Co., 74 Tex. 32, 11 S. W. 907. But see Johnson v. Railway Co., 18 Neb. 690, 26 N. W. 347, where the father lived in Sweden, and had received no aid from the deceased since his coming to the United States, a short time before the death, and it was held that the evidence should have been submitted to the jury. In Pennsylvania it is said that "parents" and "children," as used in the act, indicate the family relation in point of fact as the foundation of the right of action, without regard to age. Pennsylvania R. Co. v. Adams, 55 Pa. St. 499. If the child was of age and the family relation existed, damages may be recovered for the loss of the reasonable expectation of pecuniary advantage, if any, from the continuance of the relation. Id.; Pennsylvania R. Co. v. Keller, 67 Pa. St. 300; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15. But if the family relation has ceased, and the child does not contribute to his parents' support, no damages can be recovered. Lehigh Iron Co. v. Rupp, 100 Pa. St. 95. See, generally, Johnson v. Railroad Co., 80 Hun, 306, 30 N. Y. Supp. 318; Colorado Coal & Iron Co. v. Lamb (Colo. App.) 40 Pac. 251; Duval v. Hunt, 34 Fla. 85, 15 South. 876.

expectancy of life;[113] though it would seem that the rule is not to be applied with mathematical strictness, and that the jury may properly take into consideration the increasing wants of the parent, and the increasing ability of the child to supply them.[114] In Hutchins v. Railway Co.,[115] it was said: "The proper estimate can usually be arrived at with approximate accuracy by taking into account the calling of the deceased, and the income derived therefrom; his health, age, talents, habits of industry; his success in life in the past, as well as the amount of aid in money or services which he was accustomed to furnish the next of kin; and, if the verdict is greatly in excess of the sum thus arrived at, the court will set it aside or cut it down."[116] The application of the rules in actions

[113] Richmond v. Railway Co., supra. But in Virginia, in an action for the benefit of a widowed mother for the death of an unmarried son, who lived with and cared for her, it was held that the jury might allow such sum as would be equal to his probable earnings during his and her expectancy of life. Baltimore & O. R. Co. v. Noell, 32 Grat. 394.

[114] International & G. N. R. Co. v. Kindred, 57 Tex. 491; Texas & P. Ry. Co. v. Lester, 75 Tex. 56, 12 S. W. 955. See Hetherington v. Railway Co., 9 Q. B. Div. 160. It is error to instruct the jury as to the disposition of the child to help, since the question is, did he help? Chicago & N. W. R. Co. v. Swett, 45 Ill. 197.

[115] 44 Minn. 5, 46 N. W. 79. In that case the verdict was $3,500, while the evidence showed that the contributions of the son to his mother did not exceed $50 a year, and that her expectancy of life was only 7½ years. The court reduced the verdict to $2,000. Opsahl v. Judd, 30 Minn. 126, 14 N. W. 575.

[116] The jury may consider the circumstances of the son, his occupation, age, health, habits of industry, sobriety, and economy, his annual earnings, and his probable duration of life at the time of the accident; also the amount of property, age, health, and probable duration of plaintiff's life, and the amount of assistance he had a reasonable expectation of receiving from the son. Hall v. Railway Co., 39 Fed. 18. Though the true measure of damages for the killing of plaintiff's son is "a sum equal to the pecuniary benefit the parent had a reasonable expectation of receiving from her child had he not died," it is not misleading to charge that the damages are "such sum as you may, under the evidence, reasonably believe plaintiff might have received from the assistance of deceased had he not been killed; and you may, in estimating such sum, if any, consider, under the evidence before you, the age of deceased, the time he might have lived, the age of the plaintiff, the time she may probably live, and any other evidence tending to show what damages, if

for the death of adult children, particularly with reference to the amount of the verdict, is illustrated in the cases in the subjoined note.[117]

any, she may have suffered by the killing of deceased. You will find for plaintiff such damages, under the instructions heretofore given, as you may think will compensate her for the loss, if any, she may have sustained by the killling." Missouri Pac. R. Co. v. Lee, 70 Tex. 496, 7 S. W. 857.

[117] Deceased contributed to the support of his mother and her invalid daughter $30 to $50 a month, and gave his sister $5 to $20 a month when necessary. He was healthy, and his expectancy of life was 32½ years. His mother was 59 years old, and her expectancy was 14¾ years. His sister was 19 years old, and her expectancy 42 years. He earned $100 to $150 a month. *Held*, that a verdict for $6,500 was not excessive; and that the jury were at liberty to consider that, in aiding the daughter, who belonged to his mother's family, the son was contributing to the support of his mother, who was his next of kin. Little Rock & F. S. Ry. Co. v. Voss (Ark.) 18 S. W. 172. Deceased first received $25 and afterwards $35 per month and board; his services were constantly increasing in value; his living expenses were about $125 a year, and the balance of his wages was sent to his parents. His father was poor, and dependent on his relatives for support, and his expectancy of life was about 17 years. *Held*, that a judgment of $2,391.50 was not excessive. Fordyce v. McCants, 55 Ark. 384, 18 S. W. 371. When deceased was 23 years old, of good habits, and the sole support of his mother and her minor children, to whom he gave from $40 to $50 per month, a verdict for $3,000 is not excessive. O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269. The father was 50 years old, and had little property besides his homestead. When not on the road the son lived with him and contributed to the support of the family. There was a policy of insurance on the life of the father for the benefit of the mother, upon which the son paid the premuim, and he had promised to keep it paid. *Held*, that a verdict for $2,000 was not excessive. Chicago & A. R. Co. v. Shannon, 43 Ill. 388. The fact that deceased, whose next of kin were a father and younger brothers and sisters, contributed to the support of his brothers, is sufficient to entitle his administrator to recover more than nominal damages. Illinois & St. L. R. Co. v. Whalen, 19 Ill. App. 116. Deceased was a butcher, 22 years old, and gave all his earnings to his mother, at one time paying a debt of $400 for her. *Held*, that a verdict of $2,400 was not excessive. Chicago & A. R. Co. v. Adler, 28 Ill. App. 102. Deceased left, surviving her, a father, mother, two brothers, and a sister. She lived with her father, mother, and sister, and had contributed to the support of her family as well as she could, and was under an engagement to teach school. *Held*, that a verdict of $1,500 was not excessive. City of Salem v. Harvey, 29 Ill. App. 483; affirmed 129 Ill. 344, 21 N. E. 1076. Deceased was 22 years old, and left as next of kin a mother aged 42, able to support herself by the needle, and two brothers aged 16 and 19. The evidence of his assistance to

Death of Parent of Adult Child.

Although the benefit of the action, unless, as in Missouri, the statute otherwise provides, is not confined to minor children,[118] cases in which the facts warrant a recovery of damages by adult children for the loss of pecuniary benefits in the nature of prospective gifts are rare. The recovery must, of course, be based upon evidence of pecuniary benefits conferred by the deceased during his life, the continuance of which might reasonably have been expected.[119]

his mother was only of a general character. *Held*, that a verdict of $3,000 was excessive. Paulmier v. Railroad Co., 34 N. J. Law, 151. Deceased was industrious and economical, and, at the age of 26 years, earning $1,000 a year, out of which he was furnishing plaintiff, his mother, then 51 years old, $200 per annum. *Held*, that a verdict of $4,200 would not be disturbed. Texas & P. Ry. Co. v. Lester, 75 Tex. 56, 12 S. W. 955. Where a mother who is 60 years old, and in good health, had for many years been supported by her son, aged 22½ years, and who at the time of his death was earning from $60 to $65 per month, one-half of which he had been in the habit of giving to his mother, a verdict for $3,550 is not excessive. Missouri Pac. Ry. Co. v. Henry, 75 Tex. 220, 12 S. W. 828. A verdict for $4,995 was not so excessive as to justify reversal, where decedent, at the time of his death, was a strong, healthy man 28 years old, of good habits, and earning $1.75 per day. Webb v. Railway Co., 7 Utah, 363, 26 Pac. 981. Action by father for death of son who had just come of age, and who, for two years previous to death, while attending school, had worked on his father's farm without wages. It was intended that he should study medicine at an expense to his father of $1,000 for three or four years, and in vacation work at home. *Held*, that there was no reasonable expectation of pecuniary benefit. Mason v. Bertram, 18 Ont. 1.

[118] Baltimore & O. R. Co. v. State, 60 Md. 449.

[119] In an action for the benefit of two sons and a daughter, all married and of age, it appeared that the deceased lived with her daughter, thus enabling the latter to work and earn six dollars a week, and that the deceased also frequently assisted in nursing the sick in her sons' families; but it did not appear how often she went, how long she stayed, or what was the value of such services. *Held* (1) that, as the services rendered by the mother constituted the pecuniary benefit which the daughter had a right to expect from the continuance of the life, the value of such services, and not what the daughter might earn, was the measure of damages; (2) that there was no evidence sufficient to warrant the jury in finding any pecuniary loss to the sons. Baltimore & O. R. Co. v. State, 63 Md. 135. The deceased lived with one married daughter, and was in the habit of rendering services (the value of which did not appear) to her and to her husband, who was an invalid, and to her other adult children. *Held*, that a nonsuit was properly denied. Petrie v. Railroad

Nothing can be allowed for the loss of a father's counsel and services, except so far as they can be estimated in money.[120]

Death of Collateral Relative.

The same rules apply to the recovery of damages for the death of collateral relatives.[121]

SAME—PROSPECTIVE INHERITANCE.

137. Where it is probable that the decedent, but for his death, would have accumulated property, which, if he had died intestate, would have been inherited by the beneficiaries of the action, these facts constitute such a reasonable expectation of pecuniary benefit as to authorize a recovery of damages for its loss.[122]

Co., 29 S. C. 303, 7 S. E. 515. The court lays stress on the absence of the word "pecuniary" from the statute. A married daughter and son, nearly 21 years old, neither of them supported by their father, who left also a widow and dependent minor children, have no right to damages. St. Louis, A. & T. Ry. Co. v. Johnston, 78 Tex. 536, 15 S. W. 104. In an action by a daughter for the death of her mother, it appeared that deceased lived with plaintiff, who was a laundress, and by whom she was maintained, the deceased assisting her in the laundry, etc. It was not shown that the value of the services of the deceased exceeded her support. *Held*, that a verdict for plaintiff should be set aside. Hull v. Railway Co., 26 L. R. Ir. 289.

120 Demarest v. Little, 47 N. J. Law, 28.

121 Where decedent was addicted to the use of intoxicating liquors, was careless in his work, and did not save his earnings, his brothers and sisters, to whose support he had never contributed, were entitled to nominal damages only. Anderson v. Railroad Co., 35 Neb. 95, 52 N. W. 840. But see Grotenkemper v. Harris, 25 Ohio St. 510. Deceased had a sister and two brothers living in Denmark. He was a bridge carpenter, and received $2 a day. He had been at work three or four months, and had sent some money to his sister (how much did not appear). There was no evidence as to his age or his capacity for earning and saving money, or as to the expectation of pecuniary benefit to be derived by the next of kin from his estate if he had lived longer. *Held*, that a verdict of $1,750 should be set aside as excessive. Serensen v. Railroad Co., 45 Fed. 407. Damages to minor sisters and nieces. Duval v. Hunt, 34 Fla. 85, 15 South. 876.

122 Pym v. Railway Co., 2 Best & S. 759, 31 L. J. Q. B. 249, 8 Jur. (N. S.) 819, 10 Wkly. Rep. 737, 6 L. T. (N. S.) 1537; affirmed in 4 Best & S. 396, 32

In Pym v. Great Northern Ry. Co.,[123] where the party killed was in possession of personalty to the amount of £3,400, and was tenant for life of an estate in land worth nearly £4,000 a year, with remainder to his eldest son in tail, and, by settlement, a jointure of £1,000 a year was settled on his wife, and £20,000 secured to the younger children on his death, and the deceased died intestate, it was held that the widow and younger children had a sufficient expectation of pecuniary benefit to render its loss a ground for action. Cockburn, C. J., after observing that the loss of education and the greater comforts and enjoyments of life arising from the death of a father whose income ceases with his life is an injury in respect of which an action can be maintained, continues as follows: "A fortiori, the loss of a pecuniary provision, which fails to be made owing to the premature death of a person by whom such provision would have been made had he lived, is clearly a pecuniary loss for which compensation may be claimed. It is true that it must always remain matter of uncertainty whether the deceased person would have applied the necessary portion of income in securing to his family the social and domestic advantages of which they are said to have been deprived by his death; still more, whether he would have laid by any and what portion of his income to make provision for them at his death. But * * * it is for a jury to say, under all the circumstances, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well-founded expectation of pecuniary benefit as can be estimated in money." The jury having given £13,000,—£1,000 to the widow, and £1,500 to each of the younger children,—it was held that the latter sum ought in each case to be reduced to £1,000.

In Illinois Cent. R. Co. v. Barron,[124] an action brought under the Illinois statute, the testator was a bachelor, 35 years old, and had

Law J. Q. B. 377, 10 Jur. (N. S.) 199, 11 Wkly. Rep. 922; Illinois Cent. R. Co. v. Barron, 5 Wall. 90; Lake Erie & W. R. Co. v. Mugg, 132 Ind. 168, 31 N. E. 564; McAdory v. Louisville & N. R. Co., 10 South. 507; Castello v. Landwehr, 28 Wis. 522. The loss of the chance to be endowed out of her husband's accumulations is a pecuniary injury to the wife. Catawissa R. Co. v. Armstrong, 52 Pa. St. 282.

[123] 2 Best & S. 759, 4 Best & S. 396.

[124] 5 Wall. 90.

an estate of $35,000, which he left by will to his father. He was an attorney, but for four years prior to his death had been a judge. His term of office having expired, he was about to resume his profession, with a fair promise of doing as well as before he was elected judge, when his professional income had been about $3,000 a year. The action was for the benefit of his father, brothers, and sisters, one of whom had formerly received some assistance from him for support. The court refused to charge that it was necessary that the beneficiaries should have a legal interest in the life, but charged, among other things, that the jury had a right, in estimating the amount of pecuniary injury, to take into consideration the relations between the deceased and his next of kin, the amount of his property, the character of his business, and the prospective increase of wealth likely to accrue to a man of his age with the business and means which he had, the possibility that his estate would have decreased rather than increased, and the contingency that he might have married, and his property descended in another channel. The verdict and judgment were for $3,750; and, the case coming before the supreme court on exceptions to the charge, and on the refusal to charge as requested, the judgment was affirmed. The opinion was delivered by Mr. Justice Nelson, who said: "The damages in these cases, whether the suit is in the name of the injured party, or, in case of his death, under the statute, by the legal representative, must depend very much on the good sense and sound judgment of the jury, upon all the facts and circumstances of the particular case. If the suit is brought by the injured party, there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body. So, when the suit is brought by the representative, the pecuniary injury resulting from the death to the next of kin is equally uncertain and indefinite. If the deceased had lived, they may not have been benefited, and, if not, then no pecuniary injury could have resulted to them from his death. But the statute in respect to this measure of damages seems to have been enacted upon the idea that, as a general fact, the personal assets of the deceased would take the direction given them by the law, and hence the amount recovered is to be distributed to the wife and next of kin in the proportion provided for in the distribution of personal

property left by a person dying intestate. If the person injured had survived and recovered, he would have added so much to his personal estate, which the law, on his death, if intestate, would have passed to his wife and next of kin. In case of his death by the injury, the equivalent is given by a suit in the name of his representative."

It would seem that, where there is no evidence tending to show that the deceased would probably have accumulated anything if he had lived, no more than nominal damages should be awarded,[125] and that the verdict should be set aside if the amount is grossly out of proportion to the reasonable probabilities of the case.[126]

[125] In an action for the benefit of brothers and sisters, where the deceased had accumulated nothing, *held*, that only nominal damages should be awarded. Howard v. Canal Co., 40 Fed. 195. But in Grotenkemper v. Harris, 25 Ohio St. 510, where the deceased was only four or five years old, and the beneficiaries were a brother and sisters, it was *held* not to be error to charge that the reasonable expectation of pecuniary benefit may consist of what a person may give to his next of kin while living, as well as what they may inherit from him at his death.

[126] The injury claimed was the deprivation of the probable accumulations of deceased in his business. The jury gave a verdict of $27,500. To reach this result, they must have found that deceased, who had already acquired a competence, would have continued in business for his full expectancy of life; would have retained sufficient health and vigor of mind to enable him to do so as successfully as before; would have avoided business losses; would have safely invested his accumulations; and that the children would have received them at his death. *Held*, that the verdict should be set aside, unless the plaintiff would consent to a reduction to $15,000. Demarest v. Little, 47 N. J. Law, 28. In an action by a widow for the death of her husband, where it appeared that plaintiff was 20 years old and her husband 22 at the time of his death, and that his wages up to that time had been entirely consumed in the expenses of his household, it was error to charge that, if the jury believed the widow's expectancy of life was greater than her husband's, they should allow her the present value of any property she would probably have received from her husband as dower if he had not been killed, as the realization of any sum as dower depended on too many remote contingencies. St. Louis, I. M. & S. Ry. Co. v. Needham, 3 C. C. A. 129, 52 Fed. 371. Decedent was a widow 61 years old, who had done a profitable business as a boardinghouse keeper, and had made some money, besides supporting a daughter, and occasionally gave small amounts to a son. *Held* that, as the jury were authorized to take into consideration the reasonable expectation of her property being increased for the benefit of her children, who were of age, and the reasonable

EVIDENCE OF PECUNIARY CONDITION OF BENEFICIARIES.

138. Evidence of the pecuniary condition of the beneficiaries is inadmissible, except

EXCEPTION—(a) In some cases such evidence is admissible to show the probability of future gifts being made.

(b) In Wisconsin and New York such evidence is admissible in all cases.

As a general rule, it is inadmissible to introduce evidence of the poverty [127] or bad health [128] or of other facts tending to show the necessities of the beneficiaries, since such facts do not tend to prove that they have suffered a pecuniary loss. "If the moral obligation to support near relatives," says Cooley, C. J., in Chicago & N. W. R.

expectation of pecuniary benefit to them by support or otherwise, a verdict of $1,000 was sustained by the evidence. Tuteur v. Railroad Co., 77 Wis. 505, 46 N. W. 897. Decedent was a widower, 73 years old, strong and vigorous, and actively engaged in business. The children were of age, and not dependent on him. *Held*, that $1,000 was not excessive. City of Wabash v. Carver, 129 Ind. 552, 29 N. E. 25.

[127] Illinois Cent. R. Co. v. Baches, 55 Ill. 379; Chicago & N. W. Ry. Co. v. Moranda, 93 Ill. 302; Chicago & N. W. R. Co. v. Howard, 6 Ill. App. 569; Heyer v. Salsbury, 7 Ill. App. 93; Chicago, R. I. & P. R. Co. v. Henry, Id. 322; Beard v. Skeldon, 13 Ill. App. 54; Illinois Cent. R. Co. v. Slater, 28 Ill. App. 73, affirmed 129 Ill. 91, 21 N. E. 575; City of Delphi v. Lowery, 74 Ind. 520; Overholt v. Vieths, 93 Mo. 422, 6 S. W. 74; Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205; Hunn v. Railroad Co., 78 Mich. 513, 44 N. W. 502; Central R. R. v. Rouse, 77 Ga. 393, 3 S. E. 307; Central R. R. v. Moore, 61 Ga. 151. The Illinois cases on this subject are somewhat modified by the recent case of Pennsylvania Co. v. Keane, 143 Ill. 172, 32 N. E. 260, in which it was held that, in an action by the widow as administratrix, it is proper to allow her to testify that the deceased was at the time of her death her sole support. The opinion says: "We take it that the rule deducible from the cases is substantially this: that it is not competent to show what the pecuniary circumstances of the widow, family, or next of kin are or have been since the decease of the intestate, but that it is competent to show that the wife, children, or next of kin were dependent upon him for support before and at the time of his death."

[128] Illinois Cent. R. Co. v. Baches, supra; Benton v. Railroad Co., 55 Iowa, 496, 8 N. W. 330.

Co. v. Bayfield, "were to be the criterion, we might take their poverty into account; * * * but as this may or may not have been recognized, and, if recognized, may have been very imperfectly responded to, it is manifest that it can be no measure of the pecuniary injury the family received, or was likely to receive, from the death." But an exception to this rule is recognized in some cases where damages are based upon the loss of prospective gifts, and especially in cases for the benefit of parents on account of the death of minor children, as tending to show the probability that such gifts would have been made.[129] In Wisconsin [130] and New York [131] such evidence seems to be admissible in all cases.

EXPECTATION OF LIFE—LIFE TABLES.

139. Standard life tables are admissible to show the expectation of life of the deceased and the beneficiaries, but they are not conclusive.

In order to show the expectation of life of the deceased and of the beneficiaries the Carlisle, Northampton, and other standard life tables may be introduced;[132] though such tables are not conclusive,

[129] Potter v. Railway Co., 21 Wis. 373, 22 Wis. 615; Ewen v. Railway Co., 38 Wis. 613; Johnson v. Railway Co., 64 Wis. 425, 25 N. W. 223; Wiltse v. Town of Tilden, 77 Wis. 152, 46 N. W. 234; Staal v. Railroad Co., 57 Mich. 239, 23 N. W. 795; Cooper v. Railway Co., 66 Mich. 261, 33 N. W. 306; Missouri Pac. R. Co. v. Peregoy, 36 Kan. 424, 14 Pac. 7; Little Rock, M. R. & T. Ry. Co. v. Leverett, 48 Ark. 333, 3 S. W. 50; International & G. N. R. Co. v. Kindred, 57 Tex. 491; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291; Chicago v. McCulloch, 10 Ill. App. 459; Illinois Cent. R. Co. v. Slater, 28 Ill. App. 73, contra. See City of Chicago v. Powers, 42 Ill. 169; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491.

[130] Annas v. Railroad Co., 67 Wis. 46, 30 N. W. 282; McKeigue v. City of Janesville, 68 Wis. 50, 31 N. W. 298; Thompson v. Johnston, 86 Wis. 576, 57 N. W. 298.

[131] See post, p. 344, and notes.

[132] Donaldson v. Railroad Co., 18 Iowa, 280; Coates v. Railroad Co., 62 Iowa, 486, 17 N. W. 760; Worden v. Railroad Co., 76 Iowa, 310, 41 N. W. 26; Gorman v. Railway Co., 78 Iowa, 509, 43 N. W. 303; Louisville, C. & L. R. Co. v. Mahony's Adm'x, 7 Bush, 235; Cooper v. Railway Co., 66 Mich. 261, 33 N. W. 306; Hunn v. Railroad Co., 78 Mich. 513, 44 N. W. 502; Sellars

since the jury should consider them with the other evidence in the case,[133] and may determine the probable length of life solely upon evidence of the age, health, habits, etc., of the person.[134] The computation should be made from the death of the deceased;[135] and where, as in Iowa, the action is brought for the death of a minor to recover damages for the loss of benefits that would have accrued to the estate after his majority, it is error to compute the expectation from the age of 21.[136] The calculation of the amount of pecuniary loss should be based upon the joint lives of the deceased and of the beneficiary.[137]

v. Foster, 27 Neb. 118, 42 N. W. 907; Sauter v. Railroad Co., 66 N. Y. 50; Mississippi & T. R. Co. v. Ayres, 16 Lea, 725; San Antonio & A. P. Ry. Co. v. Bennett, 76 Tex. 151, 13 S. W. 319.

[133] Scheffler v. Railway Co., 32 Minn. 518, 21 N. W. 711; McKeigue v. City of Janesville, 68 Wis. 50, 31 N. W. 298; Georgia Railroad & Banking Co. v. Oaks, 52 Ga. 410; Georgia R. Co. v. Pittman, 73 Ga. 325; Central R. Co. v. Crosby, 74 Ga. 737; Central R. Co. v. Thompson, 76 Ga. 770. Where mortality tables are introduced, and no other evidence is offered to show that the probability of life was greater or less than that shown by such tables, it was error to charge that the tables were not controlling, but should be given just such weight as the jury thought proper. Nelson v. Railway Co. (Mich.) 62 N. W. 993.

[134] Beems v. Railway Co., 67 Iowa, 435, 25 N. W. 693; Deisen v. Railway Co., 43 Minn. 454, 45 N. W. 864; Gulf, C. & S. F. Ry. Co. v. Compton, 75 Tex. 667, 13 S. W. 667. Where the court erroneously gives positive directions for ascertaining the damages by certain mathematical calculations, the error is not cured by the subsequent statement that in the end the whole matter of damages is left entirely to the sound judgment of the jury as to what is proper under all the circumstances. St. Louis, I. M. & S. Ry. Co. v. Needham, 3 C. C. A. 129, 52 Fed. 371.

[135] Plaintiff's intestate being only five years old at the time of his death, it was error to admit in evidence tables giving no expectancy of life for any age under ten years. Rajnowski v. Railroad Co., 74 Mich. 15, 20, 41 N. W. 847, 849.

[136] Walters v. Railroad Co., 41 Iowa, 71; Wheelan v. Railway Co., 85 Iowa, 167, 52 N. W. 119.

[137] Rowley v. Railway Co., L. R. 8 Exch. 221, 42 Law J. Exch. 153, 29 Law T. (N. S.) 180; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291.

INTEREST AS DAMAGES.

140. Interest as damages cannot be recovered, except EXCEPTION—In New York, by statute, the amount recovered draws interest from the death.

While the jury may, perhaps, take into account the time which has elapsed since the death, as affecting the amount of damages, it is improper for them, after computing the amount of damages, to add interest upon that sum.[138] The New York act provides that the amount recovered shall draw interest from the death, which interest shall be added to the verdict, and inserted in the entry of judgment. This provision is not unconstitutional.[139] The rate of interest is governed by the statute regulating interest in force at the time of the verdict.[140] The interest is to be added and inserted by the clerk.[141]

REDUCTION OF DAMAGES.

141. Property received by descent or otherwise upon the death of the deceased cannot be considered in reduction of damages.

Where the beneficiary acquires property by descent or otherwise upon the death of the deceased, it is not proper for the jury to reduce the damages on that account;[142] for it may fairly be assumed that the beneficiary would, in the natural course of events, have acquired the property ultimately, and his damages are for the loss of benefits which he might have received during the remainder of the life

138 Central R. Co. v. Sears, 66 Ga. 499; Cook v. Railroad Co., 10 Hun, 426 (before act of 1870).

139 Cornwall v. Mills, 44 N. Y. Super. Ct. 45.

140 Salter v. Railroad Co., 86 N. Y. 401; Id., 23 Hun, 533, overruling Erwin v. Steamboat Co., 23 Hun, 578.

141 See Manning v. Iron Ore Co., 91 N. Y. 665, reversing 27 Hun, 219. An extra allowance should be computed on the sum awarded by the jury plus the interest inserted in the entry of judgment. Boyd v. Railroad Co., 6 Civ. Proc. R. 222; 1 How. Prac. (N. S.) 1. Contra, Sinno v. City of New York, 8 Civ. Proc. R. 252, note.

142 See San Antonio & A. P. Ry. Co. v. Long, 87 Tex. 148, 27 S. W. 113.

of the deceased, or of the accumulations which the deceased might have added to his estate, and which the beneficiary would have acquired, in addition to the estate existing at the time of the premature death. Thus, in Terry v. Jewett,[143] it was held that it was not error to refuse to charge the jury that they might take into consideration that the plaintiff would be entitled to the property of the deceased as next of kin. A distinction was suggested in Grand Trunk Ry. Co. of Canada v. Jennings,[144] by Lord Watson, who said: "Money provisions made by a husband for the maintenance of a widow, in whatever form, are matters proper to be considered by the jury in estimating her loss; but the extent, if any, to which these ought to be imputed in reduction of damages, must depend upon the nature of the provision, and the position and means of the deceased. When the deceased did not earn his own living, but had an income from property, one half of which had been settled upon his widow, a jury might reasonably come to a conclusion that, to the extent of that half, the widow was not a loser by his death, and might properly confine their estimate of her loss to the interest which she might probably have had in the other half."

Similarly, where the beneficiary receives money on account of an insurance policy on the life of the deceased, this fact is not to be considered in reduction of damages.[145] In England, however, it has been held that the jury may properly take into consideration the probable amount of future premiums which would have been payable during the life of the deceased.[146] Says Lord Watson in Grand

[143] 78 N. Y. 338, 17 Hun, 395. It is error to permit the plaintiff to show that her intestate left no property. Koosorowska v. Glasser (Super. Buff.) 8 N. Y. Supp. 197.

[144] 13 App. Cas. 800, 58 Law J. P. C. 1, 59 Law T. (N. S.) 679, 37 Wkly. Rep. 403. See Pym v. Railway Co., supra.

[145] Althorp v. Wolfe, 22 N. Y. 355; Kellogg v. Railroad Co., 79 N. Y. 72; Sherlock v. Alling, 44 Ind. 184; Carroll v. Railway Co., 88 Mo. 239; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15; Coulter v. Pine Tp., 164 Pa. St. 543, 30 Atl. 490; Baltimore & O. R. Co. v. Wightman, 29 Grat. 431; Western & A. R. Co. v. Meigs, 74 Ga. 857. See Harding v. Townshend, 43 Vt. 536. Beckett v. Railway Co., 8 Ont. 601, 13 Ont. App. 174, contra.

[146] Hicks v. Railway Co., 4 Best & S. 403, note. See Bradburn v. Railroad Co., 44 Law J. Exch. 9, L. R. 10 Exch. 1, per Bramwell, B.; Grand Trunk Ry. Co. v. Jennings, supra; Jennings v. Railway Co., 15 Ont. App. 477.

Trunk Ry. Co. v. Jennings: "The pecuniary benefit which accrued to the respondent from his premature death consisted in the accelerated receipt of a sum of money, the consideration of which had been paid by him out of his earnings. In such case the extent of the benefit may fairly be taken to be represented by the use and interest of the money during the period of acceleration; and it was upon that footing that Lord Campbell, in Hicks v. Newport, A. H. Ry. Co., suggested to the jury that, in estimating the widow's loss, the benefit which she derived from acceleration might be compensated by deducting from their estimate of the future earnings of the deceased the amount of the premiums which, if he had lived, he would have had to pay."

Since the right of action vests upon the death of the deceased, it is not permissible to show that pecuniary benefits have, from another source, subsequently accrued to the beneficiary, which are equivalent to those of which he has been deprived. Thus, in an action for the death of a wife and mother, evidence that the husband had again married, and that his second wife performed like services to those performed by the deceased, is inadmissible in mitigation of damages.[147]

DISCRETION OF JURY.

142. The jury have a large discretion in the assessment of damages.

From the indefinite nature of the proof of pecuniary loss possible in such cases, much is left to the discretion and judgment of the jury, and it is not improper to instruct them to that effect.[148] But such an instruction should not be given without charging them defi-

147 Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350; Georgia Railroad & Banking Co. v. Garr, 57 Ga. 277. It is improper on cross-examination to ask the husband if he is not engaged to be married again. Dimmey v. Railroad Co., 27 W. Va. 32.

148 Illinois Cent. R. Co. v. Barron, 5 Wall. 90; Chicago & N. W. Ry. Co. v. Whitton, 13 Wall. 270; Pennsylvania R. Co. v. Ogier, 35 Pa. St. 60; City of Vicksburg v. McLain, 67 Miss. 4, 6 South. 774; Kansas Pac. R. Co. v. Cutter, 19 Kan. 83.

nitely upon the proper measure of damages in the particular case,[149] and instructing them that the damages must be based upon the evidence,[150] and upon the pecuniary injury to the beneficiaries;[151] though, as has been shown, much is left, especially in actions for the death of minor children, to the jury's knowledge and experience.[152]

New York Rule.

A looser rule in respect to the measure of damages prevails in New York than elsewhere, under similar statutory provisions; for in that state it is held in all cases that it is enough for the plaintiff to show the age, sex, condition, physical and mental, and the circumstances and situation in life of the deceased, and the age, circumstances, and condition of the next of kin, and that, provided such evidence is introduced, it is for the jury to estimate the "pecuniary injuries," present and prospective, to the next of kin.[153] This rule differs little, if at all, from the rule elsewhere applied in actions brought by parents for the death of young children, but in New York the rule is also applied in cases in which the only possible basis for damages would seem to be the loss of prospective gifts, or of a prospective inheritance,—cases in which, in other jurisdictions, some evidence either of past gifts, or of the probability of future accumulations, is usually required. Thus, in Tilley v. Rail-

149 Pennsylvania R. Co. v. Ogier, supra; Pennsylvania R. Co. v. Vandever, 36 Pa. St. 298; Catawissa R. Co. v. Armstrong, 52 Pa. St. 282; Parsons v. Railway Co., 94 Mo. 286, 6 S. W. 464. The fact that the damages are larger than would probably upon the testimony have been found by the court is not ground for reversal. Missouri Pac. R. Co. v. Lee, 70 Tex. 496, 7 S. W. 857.

150 Chicago & N. W. R. Co. v. Swett, 45 Ill. 197; Chicago & A. R. Co. v. Shannon, 43 Ill. 338; North Chicago R. M. Co. v. Morrissey, 111 Ill. 646; Chicago, M. & St. P. Ry. Co. v. Dowd, 115 Ill. 659, 4 N. E. 368. And see Chicago, B. & Q. R. Co. v. Sykes, 96 Ill. 162; Chicago, R. I. & P. R. Co. v. Austin, 69 Ill. 426; Conant v. Griffin, 48 Ill. 410; Lake Shore & M. S. R. Co. v. Parker, 131 Ill. 557, 23 N. E. 237.

151 Chicago & A. R. Co. v. Becker, 76 Ill. 25; Chicago, B. & Q. R. Co. v. Harwood, 80 Ill. 88.

152 City of Chicago v. Scholten, 75 Ill. 468; Ohio & M. Ry. Co. v. Voight, 122 Ind. 288, 23 N. E. 774.

153 See note 83, supra.

road Co.,[154] it was held that damages for the loss of the training, instruction, and education of a mother were not confined to minor children. The opinion by Hogeboom, J., upon the measure of damages, is frequently referred to with approval.[155] The jury, he says, "are to give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death. They are not tied down to any precise rule. Within the limit of the statute, as to the amount and the species of injury sustained, the matter is to be submitted to their sound judgment and sense of justice. They must be satisfied that pecuniary injuries resulted. If so satisfied, they are at liberty to allow them from whatever source they actually proceeded, which could produce them. If they are satisfied, from the history of the family, or the intrinsic probabilities of the case, that they were sustained by the loss of bodily care or intellectual culture or moral training which the mother had before supplied, they are at liberty to allow for it. The statute has set no bounds to the sources of these pecuniary injuries."[156] In Lockwood v. Railroad Co.[157] the trial court refused

[154] 29 N. Y. 252, 24 N. Y. 471.

[155] McIntyre v. Railroad Co., 37 N. Y. 287, affirming 47 Barb. 515. In this case the deceased was a widow about 48 years old, who left three children, all of age, one a married daughter with whom she lived. She was a seamstress, capable of earning $1 a day above her board, and left only a small amount of property. She had been in the habit of making small articles of clothing for her children from time to time. A verdict for $3,500 was reduced to $1,500, and an appeal sustained for that amount. A nonsuit was granted at a former trial, and overruled in 43 Barb. 532. See, also, Keller v. Railroad Co., 2 Abb. Dec. 480, 24 How. Prac. 172; affirming Id. 17 How. Prac. 102, 28 Barb. 44.

[156] See, generally, Dickens v. Railroad Co., 1 Abb. Dec. 504; Thomas v. Railroad Co., 6 Civ. Proc. R. 353; Lustig v. Railroad Co., 65 Hun, 547, 20 N. Y. Supp. 477; Bierbauer v. Railroad Co., 15 Hun, 559, affirmed in 77 N. Y. 588. The deceased was an engineer, industrious and faithful to his mother, who was his next of kin. *Held*, that a verdict for $5,000 was not excessive. Erwin v. Steamboat Co., 23 Hun, 573; Quinn v. Power, 29 Hun, 183. Decedent was a single woman 36 years old, without other near relatives than her parents, who were 66 and 58 years old. Both were poor, and the father infirm, and, for 20 years decedent had contributed $300 or $400 per annum to their support. She was in good health, and receiving a salary of $8 or $9 per week.

[157] 98 N. Y. 523.

to charge that where the children are of full age, and living away from home, and self-supporting, no such pecuniary loss has been sustained by them as can be recovered. It was said on appeal: "Whatever the rule may be in other states, there are many cases in this which in principle sustain the rulings of the trial judge. * * * In but few cases arising under this act is the plaintiff able to show direct, specific pecuniary loss, * * * and generally the basis for the allowance of damages has to be found in the proof of the character, qualities, capacity, and condition of the deceased, and in the age, sex, circumstances, and condition of the next of kin. The proof may be unsatisfactory, and the damages may be quite uncertain and contingent; yet the jurors in each case must take the elements thus furnished, and make the best estimate of damages they can. There seems to be no other mode of administering the statute referred to, and protection against excessive damages must be found in the power of courts in some of the modes allowed by law to revise or set aside the verdicts of juries." [158]

Held, that a verdict for $4,000 damages was not excessive. Bowles v. Railroad Co., 46 Hun, 324. In Kelly v. Railway Co., 14 Daly, 418, the only relatives of the deceased were a brother and sister in Ireland, and three nephews in New York. There was no evidence that he ever did anything to assist them, nor was it shown what the proceeds of his business were, nor what, if anything, was the value of his life to his next of kin. A verdict of $1,000 was held not excessive. The court points out that the courts of New York have not discriminated between the immediate and collateral kindred, and that in other states proof is necessary that the relatives had received or were likely to receive support from the deceased. But where no facts appeared except that the deceased was a married woman aged 20 years, and a verdict of $4,000 was rendered, it was *held* that a new trial should be granted. Mitchell v. Railroad Co., 2 Hun, 535.

[158] How slight is the protection thus afforded is illustrated by Pineo v. Railroad Co., 34 Hun, 80, which was an action brought by the brother as administrator of a girl of 14, whose next of kin was supposed to be her father, who had abandoned his family years before, and concerning whom it was not known whether he was alive or dead. It was *held* that a refusal to charge that there was no evidence that the life of deceased had any pecuniary value to her father was not error, and that a verdict of $3,500 should not be set aside as excessive. In a dissenting opinion, Barker, J., pertinently remarks: "If we uphold this verdict, we do, in effect, say that the jury are omnipotent in this class of cases, and that there is no rule of law to be observed by them in assessing damages."

Excessive Verdict—Reduction of Amount.

In cases where the amount of the verdict is deemed by the court to be excessive, it is a common practice to allow the verdict to stand upon condition that the plaintiff remit a part of the sum awarded.[159] In Wisconsin, however, it is held that this practice is allowable only when the illegal portion of the judgment is readily severable from the rest, and hence there can be no remittitur in actions for death;[160] and this view has been in several cases maintained in dissenting opinions.[161]

Inadequate Verdict.

Where the damages are inadequate, the court may, in its discretion, set the verdict aside, and order a new trial.[162]

[159] Pym v. Railway Co., 2 Best & S. 759, 31 L. J. Q. B. 249, 10 Wkly. R. 737, 6 L. T. (N. S.) 537, 8 Jur. (N. S.) 819; Id., 4 Best & S. 396, 32 L. J. Q. B. 377, 11 Wkly. R. 922, 10 Jur. (N. S.) 199; Little Rock & F. S. Ry. Co. v. Barker, 39 Ark. 491; Central R. R. v. Crosby, 74 Ga. 737; Rose v. Railroad Co., 39 Iowa, 246; Hutchins v. Railway Co., 44 Minn. 5, 46 N. W. 79; Smith v. Railway Co., 92 Mo. 360, 4 S. W. 129; Demarest v. Little, 47 N. J. Law, 28; McIntyre v. Railroad Co., 37 N. Y. 287. For recent cases discussing amount of damages properly allowed, see Nickerson v. Bigelow (D. C.) 62 Fed. 900; Farmers' L. & T. Co. v. Toledo, A. A. & N. M. Ry. Co. (C. C.) 67 Fed. 73; Weller v. Railway Co., 120 Mo. 635, 23 S. W. 1061, and 25 S. W. 522; Riley v. Transit Co., 10 Utah, 428, 37 Pac. 681; San Antonio St. Ry. Co. v. Watzlazick (Tex. Civ. App.) 28 S. W. 115; Austin Rapid Transit Ry. Co. v. Cullen (Tex. Civ. App.) 29 S. W. 256; Id., 30 S. W. 578; Taylor, B. & H. Ry. Co. v. Warner (Tex. Civ. App.) 31 S. W. 66; Baltimore & O. R. Co. v. Stanley, 54 Ill. App. 215; Atchison, T. & S. F. R. Co. v. Hughes, 55 Kan. 491, 40 Pac. 919; Welch v. Railroad Co., 86 Me. 552, 30 Atl. 116; Johnson v. Railroad Co., 80 Hun, 306, 30 N. Y. Supp. 318; Texas & P. Ry. Co. v. Hudman (Tex. Civ. App.) 28 S. W. 388; Mexican Nat. R. Co. v. Finch (Tex. Civ. App) 27 S. W. 1028; St. Louis, I. M. & S. Ry. Co. v. Sweet, 60 Ark. 550, 31 S. W. 571; Nelson v. Railway Co. (Mich.) 62 N. W. 993; International & G. N. R. Co. v. McNeel (Tex. Civ. App.) 29 S. W. 1133; Gulf, C. & S. F. Ry Co. v. Johnson (Tex. Civ. App.) 31 S. W. 255.

[160] Potter v. Railroad Co., 22 Wis. 615.

[161] Little Rock & F. S. Ry. Co. v. Barker, 39 Ark. 491; Central R. R. v. Crosby, 74 Ga. 737; Rose v. Railroad Co., 39 Iowa, 246.

[162] Mariani v. Dougherty, 46 Cal. 27; Wolford v. Mining Co., 63 Cal. 483; James v. Railroad Co., 92 Ala. 231, 9 South. 335. See Springett v. Balls, 7 Best & S. 477, 4 Fost. & F. 472.

NOMINAL DAMAGES.

143. The cases are not agreed as to whether or not, in the absence of actual pecuniary loss, nominal damages may be recovered.

Since the damages are based upon the pecuniary loss of the beneficiaries, it would seem to follow that, if there is no pecuniary loss, the action cannot be maintained for the recovery even of nominal damages. This has been intimated in England,[163] and held in Michigan,[164] Texas,[165] and Wisconsin.[166] Thus, in Duckworth v. Johnson, Pollock, C. B., said: "If there was no damage the action is not maintainable. It appears to me that it was intended by the act to give compensation for damage sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence by making them pay costs." And in Hurst v. Detroit City Ry. Co., Long, J., said: "The statute does not imply that damages and pecuniary loss necessarily flow from the negligent killing." On the other hand, it has been held, or rather intimated, in a great number of cases, that damages do necessarily flow from the negligent killing, and that whenever there is proof of the negligence of the defendant, and of the existence of next of kin, the action lies for at least nominal damages;[167] al-

[163] Duckworth v. Johnson, 4 Hurl. & N. 653, 29 L. J. Exch. 25, 5 Jur. (N. S.) 630. See Boulter v. Webster, 13 Wkly. R. 289, 11 L. T. (N. S.) 598. In the earlier case of Chapman v. Rothwell, El., Bl. & El. 168, Crompton, J., had said that section 1 of Lord Campbell's act appears to contemplate giving damages, wherever the party injured could have recovered them, whether nominal or not. The jury found a verdict of £1 for the widow, and 10s. for each of the children. The court granted a new trial, without imposing costs on the plaintiff, on the ground that the jury had shrunk from their duty of deciding the issue. Springett v. Balls, 7 Best & S. 477, 4 Fost. & F. 472.

[164] Hurst v. Railway Co., 84 Mich. 539, 48 N. W. 44; Van Brunt v. Railroad Co., 78 Mich. 530, 44 N. W. 321; Charlevois v. Railroad Co., 91 Mich. 59, 51 N. W. 812.

[165] McGown v. Railroad Co., 85 Tex. 289, 20 S. W. 80.

[166] Regan v. Railway Co., 51 Wis. 599, 8 N. W. 292.

[167] Chicago & A. R. Co. v. Shannon, 43 Ill. 338; Chicago & N. W. R. Co. v. Swett, 45 Ill. 197; Chicago v. Scholten, 75 Ill. 468; Quincy Coal Co. v. Hood,

though the question of nominal damages has in few cases been actually involved in the decision.[168]

ALLEGATION OF DAMAGES.

144. Substantial damages may be recovered under the general ad damnum in those jurisdictions where nominal damages may be recovered, i. e. where some damages are presumed. In jurisdictions where nominal damages cannot be recovered, the damages must be specially pleaded.

As has been stated, it is held in some jurisdictions that the statute necessarily implies pecuniary loss to the beneficiaries from the death, and that the action can consequently be maintained in the absence of pecuniary loss for at least nominal damages; while in other jurisdictions it is held that, without pecuniary loss, the action is not maintainable, even for nominal damages.[169] In the latter jurisdictions it appears to be necessary to allege in the complaint the facts showing pecuniary loss. Thus, in Michigan it is said that the damages are special, and that it must be made to appear by proper allegations that pecuniary loss necessarily resulted.[170] And in Wisconsin it is held that the complaint must allege facts showing that loss, present or prospective, has resulted,[171] although in

77 Ill. 68; Quin v. Moore, 15 N. Y. 432; Dickens v. Railroad Co., 1 Abb. Dec. 504; Ihl v. Railway Co., 47 N. Y. 317; Lehman v. City of Brooklyn, 29 Barb. 234; Atchison, T. & S. F. R. Co. v. Weber, 33 Kan. 543, 6 Pac. 877; Thomp. Neg. p. 1293. The jury are not restricted to an award of nominal damages only, because the evidence fails to show with any certainty the extent of a sister's pecuniary loss, where she had been partly supported by deceased. Ohio & M. Ry. Co. v. Wangelin, 152 Ill. 138, 38 N. E. 760. See, also, North Chicago St. R. Co. v. Brodie, 156 Ill. 317, 40 N. E. 942.

168 Lyons' Adm'r v. Railroad Co., 7 Ohio St. 336; Kenney v. Railroad Co., 49 Hun, 535, 2 N. Y. Supp. 512; Korrady v. Railway Co., 131 Ind. 261, 29 N. E. 1069.

169 See ante, p. 348.

170 Hurst v. Railway Co., 84 Mich. 539, 48 N. W. 44.

171 Regan v. Railway Co., 51 Wis. 599, 8 N. W. 292. But in Ewen v. Railroad Co., 38 Wis. 613, where an element in the pecuniary injury was the loss

the latter state, where the complaint showed that the deceased was a laboring man, working for the defendant (without alleging that he received any compensation), and that he left a child of three years, it was held on demurrer that it sufficiently showed that the child had suffered pecuniary loss.[172]

On the other hand, in jurisdictions where it is held that nominal damages necessarily result from the death, it seems that a complaint is good on demurrer although it does not allege more than the death and the survival of beneficiaries. Thus, in New York, in an action for the benefit of a widow, the complaint was held good on demurrer notwithstanding that it contained no allegations that damages had been sustained, although the court declined to express an opinion whether, without further allegations, proof of substantial damages would be admissible.[173] And, in an Indiana case, a complaint which showed that the deceased left a widow and infant children surviving was held good on demurrer although it did not directly allege that the beneficiaries sustained actual damages; the court saying that the legal presumption is that the infant children and wife are entitled to the services of a father and husband, and that such services are valuable to them.[174] In order to allow proof of damages in these jurisdictions, it appears to be sufficient to allege that the beneficiaries have sustained damages in a certain amount.[175] It has been held in Indiana, however, in an action by a father for the death of a minor child, that, in order to recover for loss of services beyond

of a pension cut off by the death of deceased, it was *held* unnecessary to allege this fact in order to admit proof of it.

[172] Kelley v. Railway Co., 50 Wis. 381, 7 N. W. 291.

[173] Kenney v. Railroad Co., 49 Hun, 535, 2 N. Y. Supp. 512.

[174] Korrady v. Railway Co., 131 Ind. 261, 29 N. E. 1069.

[175] Safford v. Drew, 3 Duer, 627; Louisville, N. A. & C. Ry. Co. v. Buck, 116 Ind. 566, 19 N. E. 453; Barron v. Railroad Co., 1 Biss. 412, Fed. Cas. No. 1,052; Serensen v. Railroad Co., 45 Fed. 407; Barnum v. Railway Co., 30 Minn. 461, 16 N. W. 364. See, also, Westcott v. Railroad Co., 61 Vt. 438, 17 Atl. 745; Ewen v. Railroad Co., supra; Kenney v. Railroad Co., supra. The declaration averred that by the death the widow and minor children were deprived of their support and the children of their means of education, to the damage, etc. *Held*, that such averments were sufficient to admit evidence of the ability of deceased to earn money. Chicago & A. Ry. Co. v. Carey, 115 Ill. 115, 3 N. E. 519.

the date of the beginning of suit, such damages must be specially averred.[176] And a California case has held that damages for funeral expenses, if recoverable at all, must be specially alleged.[177]

[176] Pennsylvania Co. v. Lilly, 73 Ind. 252.
[177] Gay v. Winter, 34 Cal. 153.

CHAPTER XIII.

WRONGS AFFECTING REAL PROPERTY.

145–147. Damages for Detention of Real Property.
148. Damages for Detention of Dower.
149–150. Injuries to Real Property—Trespasses.
151–152. Nuisance.
153–154. Waste.
155. Contracts to Sell Real Property—Breach by Vendor.
156. Breach by Vendee.
157. Breach of Covenants—Seisin and Right to Convey.
158. Warranty and Quiet Enjoyment.
159. Against Incumbrances.
160. Covenants in Leases.

DAMAGES FOR DETENTION OF REAL PROPERTY.

145. In actions to recover the possession of real property, the measure of damages is the annual value of the land, with interest, less necessary expenses paid by the occupant, and the value of improvements made by him in good faith.

146. The occupant is liable for the profits for the whole time he has been in possession, unless, as in most states, some statute of limitations limits the right of recovery.

147. In an action for mesne profits, the costs of a previous ejectment suit and, as sometimes held, reasonable attorney's fees, may be recovered, in addition to the annual value of the land.

Whether Damages Recoverable in Ejectment.

In some states, in an action of ejectment to recover the possession of land wrongfully held by another, no damages for the wrongful detention can be recovered.[1] If the plaintiff in ejectment suc-

[1] Goodtitle v. Tombs, 3 Wils. 118; Van Alen v. Rogers, 1 Johns. Cas. 281; Harvey v. Snow, 1 Yeates (Pa.) 156; Davis v. Doe, 25 Miss. 445; Emrich v. Ireland, 55 Miss. 390.

ceeds, he recovers the possession, with mere nominal damages.[2] To recover his substantial damages he must resort to a subsequent action of trespass for mesne profits.[3] But in other states the possession and damages for the detention are recovered in one action,—either ejectment, or trespass to try title,[4] or in a similar statutory action.

The Annual Value—How Estimated.

In both classes of states the measure of damages is the same. It is the annual value of the premises;[5] not what the occupant actually received, but what should have been received.[6] The amount of rent received by the defendant from his lessee does not establish the value of the premises.[7] When the premises are of such a character that they could yield no income, and consequently no profit has been received by the occupant, no damages are recoverable.[8]

Interest.

The plaintiff may also recover interest on the sums the defendant has received or should have received as the income of the land.[9] In a New York case it was held that, where the rents had been paid quarterly, the interest should be computed quarterly.[10] The Massachusetts courts have held otherwise.[11]

[2] Van Alen v. Rogers, 1 Johns. Cas. 281.

[3] Morgan v. Varick, 8 Wend. 587; Benson v. Matsdorf, 2 Johns. 369; Mitchell v. Mitchell, 1 Md. 55; Blount v. Garen, 3 Hawy. (Tenn.) 88; Goodtitle v. Tombs, 3 Wils. 118.

[4] Boyd's Lessee v. Cowan, 4 Dall. 138; Battin v. Bigelow, Pet. C. C. 452, Fed. Cas. No. 1,108; Miller v. Melchoer, 13 Ired. 439.

[5] New Orleans v. Gaines, 15 Wall. 624; Larwell v. Stevens, 12 Fed. 559; Woodhull v. Rosenthal, 61 N. Y. 382; Taylor v. Taylor, 43 N. Y. 578; Ege v. Kille, 84 Pa. St. 333; Morrison v. Robinson, 31 Pa. St. 456; Averett v. Brady, 20 Ga. 523.

[6] Woodhull v. Rosenthal, 61 N. Y. 382; Campbell v. Brown, 2 Woods, 349, Fed. Cas. No. 2,355; Bolling v. Lersner, 26 Grat. (Va.) 36. But see Rabb v. Patterson, 42 S. C. 528, 20 S. E. 540; McMahan v. Bowe, 114 Mass. 140.

[7] Kille v. Ege, 82 Pa. St. 102.

[8] Griffey v. Kennard, 24 Neb. 174, 38 N. W. 791 (uncultivated prairie land).

[9] New Orleans v. Gaines, 15 Wall. 624; Sopp v. Winpenny, 68 Pa. St. 78; Vandervoort v. Gould, 36 N. Y. 639. Contra, Allen v. Smith, 63 Mo. 103.

[10] Jackson v. Wood, 24 Wend. 443.

[11] Hodgkins v. Price, 141 Mass. 162, 5 N. E. 502.

Deductions for Necessary Expenses.

The defendant may deduct, from the amount received as the income of the land, necessary expenses paid by him, such as taxes,[12] repairs,[13] and a ground rent which the plaintiff would have had to pay.[14]

Same—For Improvements.

When the occupant has made valuable improvements on the land, which will be a benefit to the plaintiff, their value may be set off against the latter's claim for damages.[16] The improvements must have been made, however, by one who acted in good faith, believing that he had title to the land, or no allowance will be made.[17]

The reasons for allowing deductions for improvements were well stated, in a Massachusetts case,[18] substantially as follows: The measure of damages should be, in an action of trespass for mesne profits, a sum which, upon just and equitable principles, will furnish such compensation or indemnity. The plaintiff should be placed in as good a position as he would have been in if the defendants had not dispossessed him. It seems clear that a plaintiff's claim that he is entitled to the whole amount of the rents and profits from the improved estate, without any deduction for such improvements, would be unjust and unreasonable. He would thus receive more than compensation.

[12] Wallace v. Berdell, 101 N. Y. 13, 3 N. E. 769; Ringhouse v. Keener, 63 Ill. 230; Semple v. Bank, 5 Sawy. 394, Fed. Cas. No. 12,660.

[13] Semple v. Bank, 5 Sawy. 394, Fed. Cas. No. 12,660. And see Ewalt v. Gray, 6 Watts (Pa.) 427.

[14] Doe v. Hare, 2 Cromp. & M. 145.

[16] Green v. Biddle, 8 Wheat. 1; Morrison v. Robinson, 37 Pa. St. 456; Woodhull v. Rosenthal, 61 N. Y. 396; Bedell v. Shaw, 59 N. Y 46; Hodgkins v. Price, 141 Mass. 162, 5 N. E. 502; Thomas v. Thomas' Ex'r, 16 B. Mon. (Ky.) 420; Stark v. Starr, 1 Sawy. 15, Fed. Cas. No. 13,307; Wisdom v. Reeves (Ala.) 18 South. 13.

[17] Campbell v. Brown, 2 Woods, 349, Fed. Cas. No. 2,355; Dothage v. Stuart, 35 Mo. 251; Brown v. Baldwin, 121 Mo. 106, 25 S. W. 858.

[18] Hodgkins v. Price, 141 Mass. 162, 5 N. E. 502. And see Deitzler v. Wilhite, 55 Kan. 200, 40 Pac. 272.

For How Long Profits Recoverable.

The plaintiff, in an action for mesne profits, may recover damages from the time his right to possession accrued [19] up to the time the defendant gives up the possession.[20] This is the rule in the absence of some statute of limitations applicable to such actions.[21] But in most states the right of recovery is limited to a few years before the action is begun,[22] generally six years.[23]

Costs of the Ejectment Suit.

Where, owing to the technical form of the action of ejectment, no costs were recovered, they may be made a part of the damages in a subsequent action for mesne profits.[24] In England reasonable counsel fees in the ejectment action may be recovered.[25] The same has been held in this country in some cases,[26] and denied in others.[27]

SAME—DAMAGES FOR DETENTION OF DOWER.

148. For the wrongful detention of her dower a widow is entitled to one-third the net annual value of the land. This is computed:

[19] Danziger v. Boyd, 120 N. Y. 628, 24 N. E. 482; Clark v. Boyreau, 14 Cal. 634; King v. Little, 77 N. C. 138; Roberts v. Improvement Co., 126 Mo. 460, 29 S. W. 584; Griffith v. Railway Co. (Ky.) 30 S. W. 206.

[20] Danziger v. Boyd, 120 N. Y. 628, 24 N. E. 482; Gilman v. Gilman, 111 N. Y. 265, 18 N. E. 849; McCrubb v. Bray, 36 Wis. 333; Mitchell v. Freedley, 10 Pa. St. 198; Pendergast v. McCaslin, 2 Ind. 87; Bell v. Medford, 57 Miss. 31.

[21] New Orleans v. Gaines, 15 Wall. 624.

[22] Gatton v. Tolley, 22 Kan. 678; Ringhouse v. Keener, 63 Ill. 230; Herreshoff v. Tripp, 15 R. I. 92, 23 Atl. 104. But see Budd v. Walker, 9 Barb. 493; Gaslight Co. v. Rome, W. & O. R. Co., 51 Hun, 119, 5 N. Y. Supp. 459.

[23] Jackson v. Wood, 24 Wend. 443; Hill v. Myers, 46 Pa. St. 15.

[24] Baron v. Abell, 3 Johns. 481; Doe v. Perkins, 8 B. Mon. (Ky.) 198; Tate v. Doe, 24 Miss. 465; Aslin v. Parkin, 2 Burrows, 665; Pearse v. Coaker, L. R. 4 Exch. 92; Doe v. Davis, 1 Esp. 358; Nowel v. Roake, 7 Barn. & C. 404. But see Hunt v. O'Neill, 44 N. J. Law, 564; Doe v. Filliter, 13 Mees. & W. 47.

[25] Doe v. Huddart, 4 Dowl. 437.

[26] Doe v. Perkins, 8 B. Mon. (Ky.) 198; Dan v. Chubb, 1 N. J. Law, 466. And see Gibson, C. J., in Alexander v. Herr, 11 Pa. St. 537, 539.

[27] Herreshoff v. Tripp, 15 R. I. 92, 23 Atl. 104; White v. Clack, 2 Swan (Tenn.) 230; Alexander v. Herr, 11 Pa. St. 537.

(a) Against an heir from the death of the husband.
(b) Against an alienee, from the time of demand.

Damages for detention of dower were first made recoverable by the statute of Merton,[28] and the subject is largely regulated by statute in the United States.[29] The amount of damages is computed on the same basis as for the detention of real property in other cases; that is, the net value of the land. But in the case of a widow suing for detention of dower, only one-third of the husband's whole estate is recoverable, that being the share of her husband's land to which she is entitled by the common law.[30] Against an alienee of the husband, damages can only be recovered from the time of demand.[31] As to the alienee of the heir, the rule is not uniform.[32] The heir can defeat a claim for damages by pleading that he has been always ready—"tout temps prist"—to assign dower if it had been demanded.[33] Except as changed by statute, the death of the widow during the proceedings abates both the suit and all claim for damages.[34]

[28] 20 Hen. III. c. 1.

[29] See 1 Stim. Am. St. Law, § 3278; 2 Scrib. Dower (2d Ed.) 700. In many states the husband must die seised. 2 Scrib. Dower (2d Ed.) 702. In some states damages can be recovered for only a few years prior to the suit. 1 Stim. Am. St. Law, § 3278.

[30] Rea v. Rea, 63 Mich. 257, 29 N. W. 703; Henderson v. Chaires (Fla.) 17 South. 574; Stull v. Graham, 60 Ark. 461, 31 S. W. 46; Penrice v. Penrice, Barnes, Notes Cas. 234.

[31] McClanahan v. Porter, 10 Mo. 746; Thrasher v. Tyack, 15 Wis. 256; Sellman v. Bowen, 8 Gill. & J. (Md.) 50; Layton v. Butler, 4 Har. (Del.) 507; Beavers v. Smith, 11 Ala. 20; Davis v. Logan, 9 Dana (Ky.) 185; Roan v. Holmes, 32 Fla. 295, 13 South. 339. That no damages are recoverable, see Sharp v. Pettit, 3 Yeates, 38; Gannon v. Widman, 3 Pa. Dist. R. 835; Marshall v. Anderson, 1 B. Mon. 198.

[32] As holding damages recoverable from husband's death, see 2 Scrib. Dower (2d Ed.) 715; Seaton v. Jamison, 7 Watts (Pa.) 533; Hitchcock v. Harrington, 6 Johns. 290. From demand, 2 Scrib. Dower (2d Ed.) 714.

[33] Scrib. Dower (2d Ed.) 707.

[34] Rowe v. Johnson, 19 Me. 146; Sandback v. Quigley, 8 Watts, 460; Atkins v. Yeomans, 6 Metc. (Mass.) 438; Turney v. Smith, 14 Ill. 242; Hildreth

INJURIES TO REAL PROPERTY—TRESPASSES.

149. For trespasses to real property which produce only temporary injuries, the measure of damages is the loss in rental value for the time the injury continues.

150. For permanent injuries, the measure is the loss in market value; but if this is greater than the cost of repairing the injury, then the cost of repairing plus the loss of the use of the land is the measure of damages.

Temporary Injuries.

Where the injury to the plaintiff's land was one which has ceased or one which the trespasser has remedied, the only damages to which the owner is entitled are such as result from the loss of use of the land, or the diminution in rental value.[35] Thus, in an action for flowing plaintiff's land, the damages would be the lessened value of the property for the time it was flooded.[36] And for a deversion of water, the plaintiff could recover the value of its use.[37]

Permanent Injuries.

By "permanent injuries" is not meant those which are irreparable, but merely injuries which will continue unless steps are taken to remedy them. The diminution in the market value of the premises is the measure of damages, when that is less than the cost of repairing. Thus, where fruit or ornamental trees are destroyed, the

v. Thompson, 16 Mass. 191; Roan v. Holmes, 32 Fla. 295, 13 South. 339. But that they may be recovered if the action pending is in equity, see Pollitt v. Kerr, 49 N. J. Eq. 65, 22 Atl. 800.

[35] Burditt v. Railroad Co. (Sup.) 24 N. Y. Supp. 1137; Sullens v. Railway Co., 74 Iowa, 659, 38 N. W. 545; Simmons v. Brown, 5 R. I. 299; Ellington v. Bennett, 59 Ga. 286. But see Negley v. Cowell (Iowa) 59 N. W. 48; Barrick v. Schifferdecker, 123 N. Y. 52, 25 N. E. 365.

[36] Luther v. Winnisimmet Co., 9 Cush. 171; Sullens v. Railway Co., 74 Iowa, 659, 38 N. W. 545. Cf. Falsom v. Log-Driving Co., 41 Wis. 602.

[37] Pollett v. Long, 58 Barb. 20. In Simmons v. Brown, 5 R. I. 299, the jury were allowed to consider evidence of profits lost by defendant's dam causing water to set back on plaintiff's mill.

damages are measured by the depreciation in the value of the land caused thereby, not by the value of the trees when severed.[38] It is sometimes said that, when full grown timber trees are cut and removed by a trespasser, the measure of damages is the value of the trees. The value of the trees is rather evidence of the amount of damages than its measure, but the result obtained in the case of timber trees is the same in either case,[39] though it would not be for fruit or ornamental trees, or probably for growing timber trees.[40] The same principles hold good when minerals are wrongfully mined on plaintiff's land. The value of the coal or ore may be evidence of the amount in which the plaintiff has been damaged, but the measure of damages is the diminished value of the realty.[41] This is also

[38] Carter v. Pitcher, 87 Hun, 580, 34 N. Y. Supp. 549; Edsall v. Howell, 86 Hun, 424, 33 N. Y. Supp. 892; Dwight v. Railroad Co., 132 N. Y. 199, 30 N. E. 398; Nixon v. Stillwell, 52 Hun, 353, 5 N. Y. Supp. 248; Montgomery v. Locke, 72 Cal. 75, 13 Pac. 401; Mitchell v. Billingsley, 17 Ala. 391; Wallace v. Goodall, 18 N. H. 439; Lowery v. Rowland (Ala.) 16 South. 88. And see, as to other injuries, Fisher v. Naysmith (Mich.) 64 N. W. 19; Chicago & A. R. Co. v. Robbins, 54 Ill. App. 611; International & G. N. Ry. Co. v. Davis (Tex. Civ. App.) 29 S. W. 483; O'Connor v. Shannon (Tex. Civ. App.) 30 S. W. 1096; Louisville, N. A. & C. Ry. Co. v. Sparks, 12 Ind. App. 410, 40 N. E. 546; Southern Marble Co. v. Darnell, 94 Ga. 231, 21 S. E. 531. But cf. Board of Com'rs of Rush Co. v. Trees, 12 Ind. App. 479, 40 N. E. 535; Hurley v. Jones, 165 Pa. St. 34, 30 Atl. 499.

[39] E. E. Bolles Wooden Ware Co. v. U. S., 106 U. S. 432, 1 Sup. Ct. 398; Miller v. Wellman, 75 Mich. 353, 42 N. W. 843; Winchester v. Craig, 33 Mich. 205; Michigan Land & Iron Co. v. Deer Lake Co., 60 Mich. 143, 27 N. W. 10; Cotter v. Plumer, 72 Wis. 476, 40 N. W. 379; Webster v. Moe, 35 Wis. 75; Carner v. Railway Co., 43 Minn. 375, 45 N. W. 713; Beede v. Lamprey, 64 N. H. 510, 15 Atl. 133; Kolb v. Bankhead, 18 Tex. 229; Central Railroad & Banking Co. v. Murray, 93 Ga. 256, 20 S. E. 129. Cf. Single v. Schneider, 24 Wis. 299; Gaskins v. Davis, 115 N. C. 85, 20 S. E. 188.

[40] Dwight v. Railroad Co., 132 N. Y. 199, 30 N. E. 398; Argotsinger v. Vines, 82 N. Y. 308; Nixon v. Stillwell, 52 Hun, 353, 5 N. Y. Supp. 248.

[41] Forsyth v. Wells, 41 Pa. St. 291; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; U. S. v. Magoon, 3 McLean, 171, Fed. Cas. No. 15,707; Barton Coal Co. v. Cox, 39 Md. 1; Franklin Coal Co. v. McMillan, 49 Mo. 549. That the measure of damage is the value of the coal or ore at the top of the shaft, less the cost of raising it, see Aurora Hill Consol. Min. Co. v. 85 Min. Co., 12 Sawy. 355, 34 Fed. 515; Forsyth v. Wells, 41 Pa. St. 291; Chamberlain v. Collinson, 45 Iowa, 429; Austin v. Mining Co., 72 Mo. 535. That

the measure which has been applied to actions for injuries resulting from the removal of lateral support,[42] for the destruction of a meadow,[43] and for the unlawful filling up of a mill pond.[44] If the plaintiff proves no actual damages, the trespass, nevertheless, entitles him to nominal damages.[45]

Cost of Repairing.

Where the injuries to the realty can be repaired, and that without greater expense than the diminution in the value of the land if no repairs were made, then the cost of restoring the realty to its condition before the trespass is the measure of damages.[46] But to this must be added damages for the decreased value of the land during the time the plaintiff was deprived of its full use.[47]

it is the value after it is severed, see Illinois & St. L. R. & C. Co. v. Ogle, 82 Ill. 627; McLean County Coal Co. v. Long, 81 Ill. 359; Omaha & Grant Smelting & Refining Co. v. Tabor, 13 Colo. 41, 21 Pac. 925; Sunnyside Coal & Coke Co. v. Reitz (Ind. App.) 39 N. E. 541. But see Martin v. Porter, 5 Mees. & W. 351.

[42] Gilmore v. Driscoll, 122 Mass. 199; Kopp v. Railroad Co., 41 Minn. 310, 43 N. W. 73; Moellering v. Evans, 121 Ind. 195, 22 N. E. 989; McGuire v. Grant, 25 N. J. Law, 356. But see Thurston v. Hancock, 12 Mass. 220.

[43] Ft. Worth & D. C. Ry. Co. v. Hogsett, 67 Tex. 685, 4 S. W. 365; Ft. Worth & N. O. Ry. Co. v. Wallace, 74 Tex. 581, 12 S. W. 227. But see Vermilya v. Railway Co., 66 Iowa, 606, 24 N. W. 234. For various rules as to the measure of damages for the destruction of crops, see King v. Fowler, 14 Pick. 238; Richardson v. Northrup, 66 Barb. 85; Folsom v. Driving Co., 41 Wis. 602; Drake v. Railway Co., 63 Iowa, 303; 19 N. W. 215; Byrne v. Railway Co., 38 Minn. 212, 36 N. W. 339; Gulf, C. & S. F. Ry. Co. v. McGowan, 73 Tex. 355, 11 S. W. 336; Galveston, H. & S. A. Ry. Co. v. Parr (Tex. Civ. App.) 28 S. W. 264; Colorado Consolidated Land & Water Co. v. Hartman, 5 Colo. App. 150, 38 Pac. 62; Chicago & E. R. Co. v. Barnes, 10 Ind. App. 460, 38 N. E. 428; Hopkins v. Commercial Co. (Mont.) 40 Pac. 865.

[44] Finley v. Hershey, 41 Iowa, 389.

[45] Jones v. Hannovan, 55 Mo. 462; Munroe v. Stickney, 48 Me. 462; Tootle v. Clifton, 22 Ohio St. 247.

[46] Graessle v. Carpenter, 70 Iowa, 166, 30 N. W. 392; Harrison v. Kiser, 79 Ga. 588; Seely v. Alden, 61 Pa. St. 302; Ziebarth v. Nye, 42 Minn. 541, 44 N. W. 1027; Koch v. Investment Co., 9 Wash. 405, 37 Pac. 703. But see Burtraw v. Clark, 103 Mich. 383, 61 N. W. 552; Nelson v. Village of West Duluth, 55 Minn. 497, 57 N. W. 149.

[47] Cavanagh v. Durgin, 156 Mass. 466, 31 N. E. 643; Walters v. Chamberlin, 65 Mich. 333, 32 N. W. 440; Graessle v. Carpenter, 70 Iowa, 166, 30 N. W. 392.

By the rule of avoidable consequences [48] the plaintiff can recover such damages for only what would be a reasonable time in which to repair.[49]

Consequential Damages.

Consequential damages may also be recovered, in addition to the damages already mentioned, when a proper case is presented. Thus a trespasser who pulled down a fence has been held liable for the value of cattle lost in consequence of the trespass,[50] in addition to the value of the fence. Damages for injured feelings have been recovered in an action in the nature of trespass q. c. f. for the removal of a body from a cemetery lot.[51] A defendant who undermines a store may become liable for a loss of profits caused thereby.[52] And one who destroys a dam may be liable for the loss of profits of a mill run by water supplied from the dam.[53]

Exemplary Damages and Penalties.

Exemplary damages may also be recovered in an action for injuries to real estate when the trespass causing the damage was wanton or malicious.[54] In some states it has been provided by statute that treble damages shall be recoverable for malicious or willful trespasses.[55]

[48] See ante, p. 64.

[49] Ludlow v. Village of Yonkers, 43 Barb. 493; Whipple v. Weanskuck Co., 12 R. I. 311.

[50] Damron v. Roach, 4 Humph. 134.

[51] Meagher v. Driscoll, 99 Mass. 281.

[52] Shafer v. Wilson, 44 Md. 268.

[53] White v. Moseley, 8 Pick. 356.

[54] Cutler v. Smith, 57 Ill. 252; Smalley v. Smalley, 81 Ill. 70; Koenigs v. Jung, 73 Wis. 178, 40 N. W. 801; Reynolds v. Braithwaite, 131 Pa. St. 416, 18 Atl. 1110; Brown v. Allen, 35 Iowa, 306; Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Trauerman v. Lippincott, 39 Mo. App. 478; U. S. v. Taylor, 35 Fed. 484. But see McCormack v. Showalter, 11 Ind. App. 98, 38 N. E. 875; Fishburne v. Engledove (Va.) 22 S. E. 354.

[55] Reed v. Davis, 8 Pick. 514; Michigan Land & Iron Co. v. Deer Lake Co., 60 Mich. 143, 27 N. W. 10; Barnes v. Jones, 51 Cal. 303.

SAME—NUISANCE.

151. For nuisances which are permanent, the measure of damages is the loss in the market value of the premises.

152. For nuisances which are not permanent, the ordinary measure of damages is the loss in rental value plus the expenses incurred in abating the nuisance and restoring the premises to their former condition.

When the nuisance of which the plaintiff complains is one which he cannot abate, and of which the law presumes the continuance,[56] the damage is estimated at the permanent depreciation in the market value of the premises.[57] Where the nuisance is of a temporary nature, the wrongful continuance of which will not be presumed, the measure of damages is the actual loss which the plaintiff has sustained up to the time of bringing the action.[58] This is measured, in general, by the loss in the rental value of the premises; that is, the value of the use of the land.[59] To this may be added the expense of restoring the injured premises to the condition in which

[56] As when the conduct is authorized on condition that compensation be made for damages. See ante, p. 83. As to special damages, see Rose v. Miles, 4 Maule & S. 101; Booth v. Ratte, 15 App. Cas. 188.

[57] Illinois Cent. R. Co. v. Grabill, 50 Ill. 241; Vanderslice v. City of Philadelphia, 103 Pa. St. 102; Fowle v. Northampton Co., 112 Mass. 334; Finley v. Hershey, 41 Iowa, 389; O'Connor v. Railroad Co., 56 Iowa, 735, 10 N. W. 263; Givens v. Van Studdiford, 86 Mo. 149; Consolidated Home Supply Ditch & Reservoir Co. v. Hamlin (Colo. App.) 40 Pac. 582. Where the nuisance can be abated, it has been held that there can be no recovery for permanent injuries. Cumberland & Oxford Canal Corp. v. Hitchings, 65 Me. 140; Hatfield v. Railroad Co., 33 N. J. Law, 251; Hopkins v. Railroad Co., 50 Cal. 190; Battishill v. Reed, 18 C. B. 696. And see Foote v. Water Co. (Iowa) 62 N. W. 648.

[58] See ante, p. 82; Bielman v. Railway Co., 50 Mo. App. 151; Cumberland & O. Canal Corp. v. Hitchings, 65 Me. 140; Hale v. Chard Union [1891] 1 Ch. 293.

[59] City of Chicago v. Huenerbein, 85 Ill. 594; Francis v. Schoellkopf, 53 N. Y. 152; Herbert v. Rainey (Pa. Sup.) 29 Atl. 725; Loughran v. City of Des Moines, 72 Iowa, 382, 34 N. W. 172; Gulf, C. & S. F. Ry. Co. v. Helsley, 62 Tex. 593.

they were before the nuisance began.[60] If the plaintiff has abated the nuisance, expenses so incurred may be recovered.[61] Other injuries, indirect, but not too remote, may be compensated in an action for a nuisance. Thus, the profits of an established business may be recovered;[62] damages by sickness including medical expenses[63] and loss of time;[64] and for inconvenience caused by the nuisance.[65]

When Nominal Damages Recoverable.

Annoyance, to constitute a nuisance, must cause substantial damage; for damages are the gist of the wrong, unless there is a physical invasion of or interference with another's property, in which case the presence or absence of actual damage is immaterial.

The creating or continuing of a nuisance in any form, which involves the physical invasion of or interference with another's property, is a wrong for which at least nominal damages may be recovered.[66] Neither absence of actual damages, nor even benefit from the nuisance,[67] nor abatement, will prevent such recovery.[68] Thus the overhanging of another's land is a nuisance, for which an action will lie without allegation or proof of actual damages.[69] So, to cause water to flow wrongfully upon another's land in such a way

[60] Jutte v. Hughes, 67 N. Y. 267; Emery v. Lowell, 109 Mass. 197.

[61] Jutte v. Hughes, 67 N. Y. 267; Shaw v. Cummiskey, 7 Pick. 76.

[62] St. John v. Mayor, etc., 13 How. Prac. 527; Park v. Railway Co., 43 Iowa, 636.

[63] Pierce v. Wagner, 29 Minn. 355, 13 N. W. 170; Loughran v. City of Des Moines, 72 Iowa, 382, 34 N. W. 172; Gulf, C. & S. F. R. Co. v. Richards (Tex. Civ. App.) 32 S. W. 96.

[64] Loughran v. City of Des Moines, 72 Iowa, 382, 34 N. W. 172; Lockett v. Railway Co., 78 Tex. 211, 14 S. W. 564.

[65] Baltimore & P. R. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719; Churchill v. Water Co. (Iowa) 62 N. W. 646; Randolf v. Town of Bloomfield, 77 Iowa, 50, 41 N. W. 562; Berger v. Gaslight Co. (Minn.) 62 N. W. 336; Columbus, H. V. & T. R. Co. v. Gardner, 45 Ohio St. 309, 13 N. E. 69; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719. But cf. Brown v. Watson, 47 Me. 161.

[66] Alexander v. Kerr, 2 Rawle (Pa.) 83; Munroe v. Stickney, 48 Me. 462.

[67] Francis v. Schoellkopf, 53 N. Y. 152; Wesson v. Iron Co., 13 Allen (Mass.) 95; Kimel v. Kimel, 4 Jones (N. C.) 121; Marcy v. Fries, 18 Kan. 353.

[68] Call v. Buttrick, 4 Cush. 345; Gleason v. Gary, 4 Conn. 418.

[69] Bellows v. Sackett, 15 Barb. 96; Codman v. Evans, 7 Allen, 431; Tucker v. Newman, 11 Adol. & E. 40.

that its continuance would create an easement is sufficient to justify an injunction, irrespective of damages.[70]

But when the act complained of is lawful in itself, and actionable only because of harmful consequences, a different rule prevails. Then it is only when some actual damage is done that a right of action ensues. The damage must be substantial. "Everything must be looked at from a reasonable point of view. The law does not regard a trifling inconvenience, but only large, sensible inconveniences and injuries, which sensibly diminish the comfort, enjoyment, or value of the property which they affect." [71]

SAME—WASTE.

153. The measure of damages for waste is the diminution in the market value of the inheritance.

154. In many states double or treble damages for waste are imposed by statute.

The measure of damages for waste committed by the owner of a particular estate is the diminution in the value of the estate in reversion or remainder.[72] Where waste has been committed by removing fixtures, or cutting trees, the recovery is not limited to the value of fixtures, or of the trees after severance.[73]

By the statute of Gloucester [74] a penalty of treble damages was imposed in certain cases of waste. This statute is in force in some states.[75] In others there are similar statutes, giving double or treble damages, and usually imposing an additional penalty of forfeiture of the place wasted.[76]

[70] Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11, and cases cited.

[71] 2 Jag. Torts, 778; Pickard v. Collins, 23 Barb. (N. Y.) 444; Rhodes v. Dunbar, 57 Pa. St. 274; Barnes v. Hathorn, 54 Me. 124; St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642.

[72] Van Deusen v. Young, 29 N. Y. 9; Harder v. Harder, 26 Barb. 409; White v. Stoner, 18 Mo. App. 540. For waste by a vendor, see Worrall v. Munn, 53 N. Y. 185.

[73] White v. Stoner, 18 Mo. App. 540; Hosking v. Phillips, 3 Exch. 166.

[74] 6 Edw. I. c. 5.

[75] Sackett v. Sackett, 8 Pick. 309. See 3 Bin. (Pa.) Append. 602.

[76] New York, 4 Rev. St. 1883, § 1656; Michigan, How. Ann. St. 1883, § 7945; Wisconsin, Sanb. & B. Ann. St. 1889, § 3176; Iowa, McClain's Ann.

CONTRACTS TO SELL REAL PROPERTY — BREACH BY VENDOR.

155. The proper measure of damages for the breach by a vendor of his contract to sell real property is the difference between the contract price and the market value of the land at the time of the breach, plus any part of the purchase price which has been paid, with interest.

EXCEPTION—In some states the vendee can recover, in addition to purchase money advanced, with interest, only nominal damages for a breach of the contract due to failure of the vendor's title, provided the vendor acted in good faith. In Pennsylvania, the good faith of the vendor is immaterial.

The Better Rule.

In most American states a vendee can recover substantial damages for his vendor's breach of contract to convey real property;[77] that is, the vendee is given the benefit of his bargain. This is of particular importance when the property has risen in value after the contract of sale was entered into.[78] The value of the land in estimating the damages is taken at the time it should have been conveyed under the contract.[79]

Code 1888, §§ 4568, 4569; Minn. St. 1894, §§ 5882, 5883; Missouri, 2 Rev. St. 1889, § 6401; Massachusetts, Pub. St. 1882, p. 1038; Indiana, Rev. St. 1894, § 287 (Rev. St. 1881, § 286); Kentucky, Gen. St. 1894, § 2328.

[77] Hopkins v. Lee, 6 Wheat. 109; Plummer v. Rigdon, 78 Ill. 222; Loomis v. Wadhams, 8 Gray, 557; Brigham v. Evans, 113 Mass. 538; Muenchow v. Roberts, 77 Wis. 520, 46 N. W. 802; Skaaraas v. Finnegan, 31 Minn. 48, 16 N. W. 456; Shaw v. Wilkins' Adm'r, 8 Humph. (Tenn.) 647; Case v. Wolcott, 33 Ind. 5; Duncan v. Tanner, 2 J. J. Marsh. (Ky.) 399; Robinson v. Heard, 15 Me. 296; Whiteside v. Jennings, 19 Ala. 784; Wells v. Abernethy, 5 Conn. 222; Kempner v. Cohn, 47 Ark. 519, 1 S. W. 869; Irwin v. Askew, 74 Ga. 581; Nichols v. Freeman, 11 Ired. 99; Barbour v. Nichols, 3 R. I. 187; Cade v. Brown, 1 Wash. 401, 25 Pac. 457; Dunshee v. Geoghegan, 7 Utah, 113, 25 Pac. 731; Russ v. Telfener, 57 Fed. 973.

[78] Hopkins v. Lee, 6 Wheat. 109.

[79] Allen v. Atkinson, 21 Mich. 351; Combs v. Scott, 76 Wis. 662, 45 N. W.

Nominal Damages Only—The English Rule.

In England an anomalous rule of damages has been adopted in actions against vendors for breach of contracts to sell real property. The leading cases establishing the rule in that country are Flureau v. Thornhill [80] and Bain v. Fothergill.[81] The uncertainty of English titles is assigned as the reason for the rule, but such considerations have no place under our registry laws. The English rule has been followed, however, in some states. In Pennsylvania this is carried so far that only nominal damages are recoverable even in cases where the vendor knew that his title was not good.[82] But in the other states which follow the English rule it is necessary that the vendor act in good faith or he is held liable for substantial damages.[83] So, where the title was in a third person, a vendor has been

532; Plummer v. Rigdon, 78 Ill. 222; Whiteside v. Jennings, 19 Ala. 784. That the necessary expense incurred by the plaintiff in searching the title may be recovered, see Cal. Civ. Code, § 3306. And cf. Sanderlin v. Willis, 94 Ga. 171, 21 S. E. 291. For cases of failure of the title to part of the land, see Hiner v. Richter, 51 Ill. 299; Moses v. Wallace, 7 Lea, 413; Walker v. France, 112 Pa. St. 203, 5 Atl. 208. For breach of a contract to give a lease, the measure of damages is the value of the lease; that is, the difference between the value of the premises for the term and the rent which was to be paid. Loyd v. Capps (Tex. Civ. App.) 29 S. W. 505; Paposkey v. Munkwitz, 68 Wis. 322, 32 N. W. 35; Trull v. Granger, 8 N. Y. 115; Knowles v. Steele, 59 Minn. 452, 61 N. W. 557. Expenses necessarily caused by the lessor's breach may be added. Yeager v. Weaver, 64 Pa. St. 425. But see, for expenses not recoverable, Eddy v. Coffin, 149 Mass. 463, 21 N. E. 870; Cohn v. Norton, 57 Conn. 480, 18 Atl. 595.

[80] 2 W. Bl. 1078.

[81] L. R. 7 H. L. 158. It was said by Parke, B., in Robinson v. Harman, 1 Exch. 850, that "contracts for the sale of real estate are merely on condition that the vendor has a good title, so that, when a person contracts to sell real property, there is an implied undertaking that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title."

[82] Burk v. Serrill, 80 Pa. St. 413; McCafferty v. Griswold, 99 Pa. St. 276; McNair v. Compton, 35 Pa. St. 23. But see Hennershotz v. Gallagher (Pa. Sup.) 16 Atl. 518.

[83] Pumpelly v. Phelps, 40 N. Y. 59; Conger v. Weaver, 20 N. Y. 140; Margraf v. Muir, 57 N. Y. 155; Walton v. Meeks, 120 N. Y. 79, 23 N. E. 1115; Rineer v. Collins, 156 Pa. St. 342, 27 Atl. 28; Donner v. Redenbaugh, 61 Iowa, 269, 16 N. W. 127; Yokom v. McBride, 56 Iowa, 139, 8 N. W. 795; Dunnica

held liable beyond nominal damages, even though the vendor reasonably believed that he could procure a conveyance of the title of the owner.[84]

Fraudulent Representations by Vendor.

Where a vendor makes fraudulent statements, in order to induce a vendee to purchase land, as to the quantity, boundaries, or condition and improvements of the land contracted to be sold, the measure of damages is the difference between the value of the land as it is and its value if it had been as represented.[85]

SAME—BREACH BY VENDEE.

156. The measure of damages for the breach by a vendee of his contract to purchase real property is the difference between the contract price and the value of the land.

When a purchaser of real property fails to carry out his contract, the vendor can recover such an amount as damages as will make him whole. If the land was worth less than he sold it for, or if it depreciated in value between the time the contract was made and its breach by the vendee, the vendor can recover the difference in value of the land and what the vendee agreed to pay for it.[86] In some cases the vendor has been permitted to recover the contract price,[87] but this gives him more than compensation, since he still

v. Sharp, 7 Mo. 71; Herndon v. Venable, 7 Dana (Ky.) 371; Baltimore Permanent Bldg. & Land Soc. v. Smith, 54 Md. 187; Sanford v. Cloud, 17 Fla. 532; Tracy v. Gunn, 29 Kan. 508.

[84] Pumpelly v. Phelps, 40 N. Y. 59; Heimburg v. Ismay, 35 N. Y. Super. Ct. 35.

[85] Drew v. Beall, 62 Ill. 164; Krumm v. Beach, 96 N. Y. 398; Page v. Wells, 37 Mich. 415; Gates v. Reynolds, 13 Iowa, 1; Hahn v. Cummings, 3 Iowa, 583.

[86] Allen v. Mohn, 86 Mich. 328, 49 N. W. 52; Old Colony R. Co. v. Evans, 6 Gray, 25; Ellet v. Paxson, 2 Watts & S. (Pa.) 418; Griswold v. Sabin, 51 N. H. 167; Porter v. Travis, 40 Ind. 556; Anderson v. Truitt, 53 Mo. App. 590; Hogan v. Kyle, 7 Wash. 595, 35 Pac. 399. But see McGuinness v. Whalen, 16 R. I. 558, 18 Atl. 158.

[87] Richards v. Edick, 17 Barb. 260; Goodpaster v. Porter, 11 Iowa, 161; Inhabitants of Alna v. Plummer, 4 Me. 258.

has the land. Where the vendee has been in possession, interest on the whole amount of purchase money unpaid has been allowed as additional damages.[88]

BREACH OF COVENANTS—SEISIN AND RIGHT TO CONVEY.

157. The measure of damages for breach of a covenant of seisin or right to convey is the purchase price paid, with interest, and costs of the ejectment suit.

For the breach of covenants of title, the rules of damages are anomalous. The can be explained only through the feudal origin of the covenants themselves. The rules as they are in force in most of the states operate to restore the parties to the position they were in before any contract was made, and not to give such damages as would place the covenantee in as good a position as though the contract made by the covenantor had been performed.

The covenants of seisin and of right to convey are the same, so far, at least, as the measure of damages for their breach is concerned. The covenantee does not get the benefit of his bargain, as he should, but only recovers what he has paid for the land.[89] If the eviction is only partial, a proportionate amount of the consideration paid is recovered.[90] If there has been no eviction, only nominal damages can be recovered.[91] Interest on the purchase price, or any part of it, which has been paid, may be recovered as a part of the damages.[92] When the covenantee has defended an ejectment

[88] Stevenson v. Maxwell, 2 N. Y. 408; Fludyer v. Cocker, 12 Ves. 25.

[89] Weber v. Anderson, 73 Ill. 439; Bingham v. Weiderwax, 1 N. Y. 509; Pitcher v. Livingston, 4 Johns. 1; Nichols v. Walter, 8 Mass. 243; Hodges v. Thayer, 110 Mass. 286; McInnis v. Lyman, 62 Wis. 191, 22 N. W. 405; Kimball v. Bryant, 25 Minn. 496; Montgomery v. Reed, 69 Me. 510; Martin v. Long, 3 Mo. 391. But see Smith v. Strong, 14 Pick. 128, a case where the consideration paid could not be proved.

[90] Tone v. Wilson, 81 Ill. 529; Guthrie v. Pugsley, 12 Johns. 126; Morris v. Phelps, 5 Johns. 49; Cornell v. Jackson, 3 Cush. (Mass.) 506; McInnis v. Lyman, 62 Wis. 191, 22 N. W. 405; Bibb v. Freeman, 59 Ala. 612. Cf. Hartford & Salisbury Ore Co. v. Miller, 41 Conn. 112.

[91] Smith v. Hughes, 50 Wis. 620, 7 N. W. 653; Cockrell v. Proctor, 65 Mo. 41; Norman v. Winch, 65 Iowa, 263, 21 N. W. 598.

[92] Bickford v. Page, 2 Mass. 455; Sumner v. Williams, 8 Mass. 162; Smith

suit brought by the rightful owner, and has been defeated, he may recover from the covenantor the costs of the suit.[93] In most states this includes counsel fees,[94] but not in all.[95]

SAME—WARRANTY AND QUIET ENJOYMENT.

158. The measure of damages for breach of a covenant of warranty or quiet enjoyment is in most states the purchase price paid, with interest, for the time the covenantee is liable for mesne profits, plus the costs of any suit brought to try the title.

EXCEPTION—In a few states the measure of damages for breach of these covenants is the value of the land at the time of eviction.

The Consideration as the Measure.

In nearly all the states the damages which are given on covenants of warranty and quiet enjoyment are based on the old feudal doctrine of warranty, and the value of the land at the time of the covenant is made the measure. But the value of the land is taken at the price which was paid for it. Though this may be contrary to all the fundamental principles of damages, it is certainly the rule in the great majority of states.[96] Under this rule a covenantee, who is evicted by one having a superior title, cannot recover from his warrantor for improvements which he has erected on the land;[97] though,

v. Strong, 14 Pick. 128; Martin v. Long, 3 Mo. 391; Lawless v. Collier's Ex'rs, 19 Mo. 480; Brandt v. Foster, 5 Iowa, 289.

[93] Sumner v. Williams, 8 Mass. 162; Rickert v. Snyder, 9 Wend. 416; Staats v. Ten Eyck, 3 Caines, Cas. 111.

[94] Staats v. Ten Eyck, 3 Caines, Cas. 111; Rickert v. Snyder, 9 Wend. 416; Ryerson v. Chapman, 66 Me. 557.

[95] Williams v. Burg, 9 Lea, 455; Jeter v. Glenn, 9 Rich. Law, 374; Turner v. Miller, 42 Tex. 418.

[96] Staats v. Ten Eyck, 3 Caines, Cas. 111; Harding v. Larkin, 41 Ill. 413; Devine v. Lewis, 38 Minn. 24, 35 N. W. 711; Brandt v. Foster, 5 Iowa, 287; Lambert v. Estes, 99 Mo. 604, 13 S. W. 284; Alvord v. Waggoner (Tex. Civ. App.) 29 S. W. 797; Rash v. Jenne, 26 Or. 169, 37 Pac. 538. But see Brooks v. Black, 68 Miss. 161, 8 South. 332; Taylor v. Wallace (Colo.) 37 Pac. 963.

[97] Pitcher v. Livingston, 4 Johns. 1; Hunt v. Raplee, 44 Hun, 149. But see Ela v. Card, 2 N. H. 175.

as has been seen, the value of such improvements is deducted from the mesne profits, which are recovered by the real owner.[98] Whenever the covenantee is liable for mesne profits, he can recover interest on the consideration paid for the same length of time that he is so liable for the mesne profits.[99] There may be a recovery, also, as part of the damages, of the costs of any suits brought or defended in settling the title to the land,[100] provided the costs were incurred in good faith.[101] Costs may include attorney's fees.[102]

The Value at Eviction as the Measure.

In Massachusetts and a few other states the measure of damages awarded on the breach of covenants of warranty and quiet enjoyment is the value of the land at the time of the eviction.[103] This, of course, includes improvements.[104]

SAME—AGAINST INCUMBRANCES.

159. The measure of damages for breach of a covenant against incumbrances is:

(a) For a permanent incumbrance, the diminution in the value of the premises due to the incumbrance,—not exceeding, in most states, the consideration paid; in others, not exceeding the value of the land (p. 270).

[98] Ante, p. 354.

[99] Cox v. Henry, 32 Pa. St. 18; Hutchins v. Roundtree, 77 Mo. 500.

[100] Bennet v. Jenkins, 13 Johns. 50; Swartz v. Ballou, 47 Iowa, 188.

[101] Ryerson v. Chapman, 66 Me. 557.

[102] Harding v. Larkin, 41 Ill. 413; Swartz v. Ballou, 47 Iowa, 188; Rickert v. Snyder, 9 Wend. 416; Miservey v. Snell (Iowa) 62 N. W. 767. Contra, Leflingwell v. Elliott, 10 Pick. 204; Turner v. Miller, 42 Tex. 419.

[103] Norton v. Babcock, 2 Metc. (Mass.) 510; Furnas v. Durgin, 119 Mass. 500; Hardy v. Nelson, 27 Me. 525; Keeler v. Wood, 30 Vt. 242; Sterling v. Peet, 14 Conn. 245; Weeks v. Barton (Tex. Civ. App.) 31 S. W. 1071 (but see Gass v. Sanger [Tex. Civ. App.] 30 S. W. 502). For failure of title of one of several parcels the damage is the value of that parcel. Grant v. Hill (Tex. Civ. App.) 30 S. W. 952.

[104] Coleman v. Ballard's Heirs, 13 La. Ann. 512; Bunny v. Hopkinson, 27 Beav. 565.

(b) For incumbrance which causes a total eviction, the consideration with interest and costs in most states, or the value of the land with interest in others; for a partial eviction, a proportionate amount (p. 370).

(c) For a removable incumbrance, the reasonable expense of removing it, not exceeding the consideration or the value of the land (p. 371).

Permanent Incumbrances.

When a grantor has conveyed with a covenant against incumbrances, and it turns out that there is a permanent incumbrance on the land, such as a right of way or other easement, the grantee is entitled to such a sum as will compensate him for the decreased value of the land, regarded as a permanent injury.[105] The amount recoverable is limited, however, by the sum which could be recovered for a total loss of the land.[106]

Eviction Total or Partial.

An incumbrance may be such that it causes the eviction of the covenantee. In such case the amount of recovery is measured by the same rules as a recovery on the breach of a covenant of warranty, and the same conflict in the cases exists.[107] The measure of damages is either the consideration paid, with interest and costs,[108] or the value of the land, with interest from the time of eviction.[109] When the eviction is temporary only, as by an outstanding term of years or a dower interest, the measure of damages is the value of the outstanding interest.[110] For a partial eviction, the damages

[105] Bronson v. Coffin, 108 Mass. 175; Harlow v. Thomas, 15 Pick. 66; Grant v. Tallman, 20 N. Y. 191; Mackey v. Harmon, 34 Minn. 168, 24 N. W. 702; Kellogg v. Malin, 62 Mo. 429; Mitchell v. Stanley, 44 Conn. 312.

[106] Clark v. Zeigler, 79 Ala. 346; Koestenbader v. Peirce, 41 Iowa, 204.

[107] See ante, p. 368.

[108] Dimmick v. Lockwood, 10 Wend. 142; Grant v. Tallman, 20 N. Y. 191; Howell v. Moores, 127 Ill. 67, 19 N. E. 863; Patterson v. Stewart, 6 Watts & S. (Pa.) 527; Stewart v. Drake, 9 N. J. Law, 139; McGuffey v. Humes, 85 Tenn. 26, 1 S. W. 506; Jenkins v. Jones, 9 Q. B. Div. 128.

[109] Barrett v. Porter, 14 Mass. 143; Horsford v. Wright, Kirb. (Conn.) 3.

[110] Rickert v. Snyder, 9 Wend. 416; Terry v. Drabenstadt, 68 Pa. St. 400;

recoverable are proportioned to the value or price of the part lost, not exceeding, of course, the amount which could be recovered for a total eviction.[111]

Removable Incumbrances.

Where incumbrances exist, such as mortgages, which can be removed by the payment of money, the expense of removing the incumbrance is the measure of the covenantee's damage;[112] but this must not exceed the price or value of the land as the case may be.[113] The covenantee must not pay more than is necessary in removing the incumbrance.[114]

160. SAME—COVENANTS IN LEASES.

When any of the foregoing covenants occur in leases, the same rules govern the damages for their breach as when they are found in deeds.[115] The other covenants usually inserted in leases are mere contracts, for the breach of which the principles of damages have already been discussed.[116]

Tierney v. Whiting, 2 Colo. 620. But see Harrington v. Murphy, 109 Mass. 299.

111 Harlow v. Thomas, 15 Pick. (Mass.) 66; Wright v. Nipple, 92 Ind. 310.

112 Prescott v. Trueman, 4 Mass. 627; Donahoe v. Emery, 9 Metc. (Mass.) 63; Winslow v. McCall, 32 Barb. 241; Hall v. Dean, 13 Johns. 105; Hurd v. Hall, 12 Wis. 112; Ward v. Ashbrook, 78 Mo. 515; Dillahunty v. Railway Co., 59 Ark. 699, 27 S. W. 1002, and 28 S. W. 657. And see, for cases giving nominal damages, McGuckin v. Milbank, 83 Hun, 473, 31 N. Y. Supp. 1049; Grant v. Tallman, 20 N. Y. 191; Tufts v. Adams, 8 Pick. 547.

113 Johnson v. Collins, 116 Mass. 392; Grant v. Tallman, 20 N. Y. 191; Bailey v. Scott, 13 Wis. 618.

114 Bradshaw v. Crosby, 151 Mass. 237, 24 N. E. 47; Coburn v. Litchfield, 132 Mass. 449. For breach of covenants to remove incumbrances, see Somers v. Wright, 115 Mass. 292.

115 Dobbins v. Duquid, 65 Ill. 464; Sheets v. Joyner, 11 Ind. App. 205, 38 N. E. 830; Clark v. Fisher, 54 Kan. 403, 38 Pac. 493; Wetzel v. Richereek (Ohio) 40 N. E. 1004.

116 See Beach v. Crain, 2 N. Y. 86; Thomson-Houston Electric Co. v. Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7; United States Trust Co. v. O'Brien, 143 N. Y. 284, 38 N. E. 266; Gulliver v. Fowler, 64 Conn. 556, 30 Atl. 852; Trinity Church v. Higgins, 48 N. Y. 532; B. F. Myers Tailoring Co. v. Keeley, 58 Mo. App. 491; McHenry v. Marr, 39 Md. 510; Penley v. Watts, 7 Mees. & W. 601.

CHAPTER XIV.

BREACH OF MARRIAGE PROMISE.

161. In General.
162. Compensatory Damages.
163. Exemplary Damages.

IN GENERAL.

161. Damages for breach of promise of marriage are both:
(a) **Compensatory, and**
(b) **Exemplary.**

COMPENSATORY DAMAGES.

162. Compensation may be recovered for all the natural and probable consequences of the breach, including both:
(a) **Pecuniary losses** (p. 373), **and**
(b) **Nonpecuniary losses** (p. 373).

Actions for breach of promise of marriage are peculiar in many respects. The action is nominally for a breach of contract, but the measure of damages is fixed by rules which do not apply to other actions of contract. They are awarded upon principles more commonly applicable in actions of tort.[1] "Damages in this action have never been limited to the simple rule governing actions upon simple contracts for the payment of money." [2] Compensation for mental suffering [3] and exemplary damages are recoverable. These striking differences grow out of the nature of the consequences of a breach. In most ordinary contracts, the damages are wholly pecuniary, and, as has been seen, are governed by definite rules. But, in case of a

[1] Sherman v. Rawson, 102 Mass. 395.

[2] Thorn v. Knapp, 42 N. Y. 474, 483.

[3] Wells v. Padgett, 8 Barb. 323; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936; Tobin v. Shaw, 45 Me. 331; Tyler v. Salley, 82 Me. 128, 19 Atl. 107; Wilbur v. Johnson, 58 Mo. 600; Allen v. Baker, 86 N. C. 91.

breach of promise of marriage, perhaps the principal damage is nonpecuniary. Such a wrong is peculiarly apt to cause mental suffering. In other respects, also, the damages are very much at large. The result has been that, as in most torts, the damages are very much within the sound discretion of a jury.

Pecuniary Losses.

As in other cases, compensation may be recovered for pecuniary losses proximately caused. This includes the money value or worldly advantage of a marriage which would have given plaintiff a permanent home and an advantageous establishment.[4] Evidence of defendant's financial and social position is therefore admissible.[5] The plaintiff is entitled to such damages as would place her in as good a position pecuniarily as she would have been in if the contract had been fulfilled.[6] The actual outlay in preparation for the marriage may be recovered, if it is specially pleaded.[7]

Nonpecuniary Losses.

The nonpecuniary losses caused by a breach of promise of marriage include the injury to reputation,[8] wounded affections, mortification or distress of mind, and the like.[9] The amount to be awarded

[4] Coolidge v. Neat, 129 Mass. 146; Grant v. Wiley, 101 Mass. 356; Harrison v. Swift, 13 Allen, 144.

[5] Bennett v. Beam, 42 Mich. 346, 4 N. W. 8; Berry v. Da Costa, L. R. 1 C. P. 331; Miller v. Rosier, 31 Mich. 475; McPherson v. Ryan, 59 Mich. 33, 26 N. W. 321; Rutter v. Collins, 103 Mich. 143, 61 N. W. 267; Crosier v. Craig, 47 Hun, 83; Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308; Kniffen v. McConnell, 30 N. Y. 285; Olson v. Solverson, 71 Wis. 663, 38 N. W. 329; Richmond v. Roberts, 98 Ill. 472; Douglas v. Gausman, 68 Ill. 170; Harrison v. Cage, Carth. 467; Johnson v. Travis, 33 Minn. 231, 22 N. W. 624; Lawrence v. Cooke, 56 Me. 187. Defendant's reputation for wealth may be shown. Stratton v. Dole, 45 Neb. 472, 63 N. W. 875; Ortiz v. Navarro (Tex. Civ. App.) 30 S. W. 581; Stribley v. Welz, 8 Ohio Cir. Ct. R. 571. Evidence of wealth should be confined to general reputation. Kniffen v. McConnell, 30 N. Y. 285. Plaintiff's lack of property may be shown. Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936.

[6] Lawrence v. Cooke, 56 Me. 187. Cf. Miller v. Rosier, 31 Mich. 475.

[7] Glasscock v. Shell, 57 Tex. 215. See, also, Stribley v. Welz, 8 Ohio Cir. Ct. R. 571.

[8] Johnson v. Caulkins, 1 Johns. Cas. 116; Goddard v. Westcott, 82 Mich. 180, 188, 46 N. W. 242.

[9] Harrison v. Swift, 13 Allen, 144; Wells v. Padgett, 8 Barb. 323; Sheahan

for such items of injury is necessarily left to the sound discretion of the jury.[10] If their verdict is so excessive or inadequate as to indicate passion or prejudice, it may be set aside.[11] As in other cases where the loss is nonpecuniary and the damages are discretionary with the jury, evidence in aggravation or mitigation is admissible to affect their estimate.

Same—Circumstances of Aggravation.

In estimating the damages, the jury may take into account the fact that plaintiff had been seduced by defendant, as tending to increase the mortification and distress suffered by her.[12] "If by reason of an imprudent and criminal act, in which both participated, she is brought to such a state that the suffering occasioned to her feelings and affections must necessarily be increased by his abandonment, then that would be but an inadequate and poor compensation

v. Barry, 27 Mich. 217; Goddard v. Westcott, 82 Mich. 180, 188, 46 N. W. 242; Holloway v. Griffith, 32 Iowa, 409; Wilbur v. Johnson, 58 Mo. 600; Coolidge v. Neat, 129 Mass. 146. Plaintiff may show that she appeared sincerely attached to defendant. Sprague v. Craig, 51 Ill. 288.

[10] Tobin v. Shaw, 45 Me. 331; Coryell v. Colbaugh, 1 N. J. Law, 77; Stout v. Prall, 1 N. J. Law, 79; Southard v. Rexford, 6 Cow. 254.

[11] Richmond v. Roberts, 98 Ill. 472; Douglas v. Gausman, 68 Ill. 170; Goodall v. Thurman, 1 Head. (Tenn.) 209; Hattin v. Chapman, 46 Conn. 607.

[12] Sherman v. Rawson, 102 Mass. 395; Berry v. Da Costa, L. R. 1 C. P. 331; Paul v. Frazier, 3 Mass. 71; Kelley v. Riley, 106 Mass. 339; Kniffen v. McConnell, 30 N. Y. 285; Wells v. Padgett, 8 Barb. 323; Tubbs v. Van Kleek, 12 Ill. 446; Burnett v. Simpkins, 24 Ill. 264; Bennett v. Beam, 42 Mich. 346, 4 N. W. 8; Sheahan v. Barry, 27 Mich. 217; Bird v. Thompson, 96 Mo. 424, 9 S. W. 788; Coil v. Wallace, 24 N. J. Law, 291; Hattin v. Chapman, 46 Conn. 606; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49. But it must be pleaded. Leavitt v. Cutler, 37 Wis. 46; Tyler v. Salley, 82 Me. 128, 19 Atl. 107; Cates v. McKinney, 48 Ind. 562. Contra, Jennette v. Sullivan, 63 Hun, 361, 18 N. Y. Supp. 266. Loss of time and medical expenses resulting from seduction cannot be recovered. Tyler v. Salley, 82 Me. 128, 19 Atl. 107; Giese v. Schultz, 53 Wis. 462, 10 N. W. 598. Damages may be recovered for the pain and humiliation of giving birth to a bastard. Wilds v. Bogan, 57 Ind. 453. In some states seduction cannot be proved in aggravation of damages. Weaver v. Bachert, 2 Pa. St. 80; Gring v. Lerch, 112 Pa. St. 244, 250, 3 Atl. 841; Tyler v. Salley, 82 Me. 128, 19 Atl. 107; Burks v. Shain, 2 Bibb, 341. It is for the jury to say whether they will consider the fact of seduction in estimating damages, and it is error to instruct that they must consider it. Osmun v. Winters, 25 Or. 260, 35 Pac. 250.

which did not take it into account."[13] The seduction must have been accomplished by means of the promise of marriage.[14]

In connection with the question how far plaintiff has been wounded in her affections, or suffered mortification or distress, the jury may consider the length of time during which the engagement had subsisted,[15] and the abruptness and humiliation with which it was broken.[16] Where a woman has been wantonly deserted after a long engagement, and when her affections have been deeply implanted, her wounded spirit, the disgrace, the insult to her feelings, the probable solitude which may result by reason of such desertion, after a long courtship, are all matters to be considered by the jury.[17] For the purpose of enhancing damages, the plaintiff may prove that she announced the fact of her engagement to her friends, and invited them to attend the wedding.[18]

In Southard v. Rexford[19] it was held that the attempt to justify a breach of promise of marriage by stating, upon the record, as the cause of desertion of the plaintiff, that she had repeatedly had criminal intercourse with various persons, is a circumstance which ought to aggravate damages, when there is a complete failure to prove the charge. The reason for the rule has been said to be that a verdict for nominal or trifling damages under such circumstances would be fatal to the character of the plaintiff. It has been intimated that the rule only applies where the justification is pleaded,[20] but it has been held to be equally applicable where evidence of such facts is offered in mitigation, without being specially pleaded.[21] It is certainly an anomaly, in an action for a breach of contract, to hold

[13] Sherman v. Rawson, 102 Mass. 395.

[14] Espy v. Jones, 37 Ala. 379.

[15] Coolidge v. Neat, 129 Mass. 146; Grant v. Willey, 101 Mass. 356.

[16] McPherson v. Ryan, 59 Mich. 33, 26 N. W. 321.

[17] Coolidge v. Neat, 129 Mass. 146. Plaintiff's altered social position may be considered. Smith v. Woodfine, 1 C. B. (N. S.) 660; Berry v. Da Costa, L. R. 1 C. P. 331.

[18] Reed v. Clark, 47 Cal. 194; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936.

[19] 6 Cow. 254.

[20] Kniffen v. McConnell, 30 N. Y. 285, per Ingraham, J.

[21] Thorn v. Knapp, 42 N. Y. 474; Kniffen v. McConnell, 30 N. Y. 285; Davis v. Slagle, 27 Mo. 600.

that setting up matters in an answer to excuse such breach, the proof of which fails, is an aggravation of damages,[22] but this action is anomalous in many other respects. The rule has been denied,[23] and in some states it applies only when the justification was made in bad faith.[24]

Same—Circumstances in Mitigation.

The defendant may show, in mitigation of damages, licentious conduct in plaintiff, and her general character as to sobriety and virtue, without any limitation as to time. "The object of this action is, not merely compensation for the immediate injury sustained, but damages for the loss of reputation. This must necessarily depend on the general conduct of the party subsequent to, as well as previous to, the injury complained of, and the damages to be recovered, as in actions for defamation, ought to be regulated by all the circumstances of the case. The proof of reputation cannot depend on time. It is a question which is general in its nature; and the inquiry respecting it, when material, must be general."[25] A breach of the criminal law by the plaintiff, as by profane cursing and swearing, though not a defense to the action, may be given in mitigation of damages.[26] Evidence of plaintiff's abusive conduct towards defendant's mother and sister, and of her lewd and immodest conduct, can be considered only in mitigation of damages.[27] Consanguinity, not within the forbidden degrees, will not mitigate or excuse a breach of promise to marry.[28] The jury cannot consider, in mitigation of damages, the probability that, owing to defendant's want of love and affection, such as a husband should bear his wife, the marriage would be an unhappy one. "It virtually would have been say-

[22] Kniffen v. McConnell, 30 N. Y. 285; Leavitt v. Cutler, 37 Wis. 46, 53.

[23] Hunter v. Hatfield, 68 Ind. 416.

[24] Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95; Leavitt v. Cutler, 37 Wis. 46; Blackburn v. Mann, 85 Ill. 222; Fidler v. McKinley, 21 Ill. 308; Denslow v. Van Horn, 16 Iowa, 476; Reed v. Clark, 47 Cal. 194. See, also, Simpson v. Black, 27 Wis. 206.

[25] Johnson v. Caulkins, 1 Johns. Cas. 116, 3 Johns. Cas. 437. See, generally, Button v. McCauley, 38 Barb. 413, 5 Abb. Prac. (N. S.) 29; Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95; Williams v. Hollingsworth, 6 Baxt. 12.

[26] Berry v. Bakeman, 44 Me. 164.

[27] Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95.

[28] Id.

ing that the plaintiff ought not to recover the damage actually sustained because the defendant might have inflicted a greater. In other words, it would be offsetting the injury that he might have done against that already inflicted." [29] It has been held that the fact that defendant is afflicted with an incurable disease may be shown in mitigation of damages. In Johnson v. Jenkins,[30] defendant was permitted to show, in mitigation of damages, that he refused to consummate the marriage because of the settled opposition of his mother, who was in infirm health. It has been held that an offer by the defendant to marry plaintiff, made after suit brought, is not admissible in mitigation of damages.[31]

Defendant's knowledge, at the time the promise is made, of the facts relied on as a defense or to mitigate the damages is important. Thus, if the promise is made in ignorance of the fact that plaintiff had borne a bastard child, or had indulged in illicit intercourse with other men, such facts constitute a complete bar to the action;[32] but, if known to defendant, they constitute no defense,[33] and at most can be considered only in mitigation.[34] Thus, it has been held that, if the lack of virtue is relied on to absolve the defendant from the fulfillment of his contract, his knowledge of that fact must have been acquired after entering into the engagement, and the defendant must have terminated the engagement immediately upon being apprised of the truth. But the bad character of the plaintiff may be shown in mitigation of damages, even though the defendant was cognizant of the facts at the time of making the contract, for the

[29] Piper v. Kingsbury, 48 Vt. 480.

[30] 24 N. Y. 252.

[31] Kurtz v. Frank, 76 Ind. 594; Bennett v. Beam, 42 Mich. 346, 352, 4 N. W. 8; Holloway v. Griffith, 32 Iowa, 409; Southard v. Rexford, 6 Cow. 254. Contra, Kelly v. Renfro, 9 Ala. 325.

[32] Boynton v. Kellogg, 3 Mass. 189; Guptill v. Verback, 58 Iowa, 98, 12 N. W. 125; Berry v. Bakeman, 44 Me. 164; Budd v. Crea, 6 N. J. Law, 370; Burnett v. Simpkins, 24 Ill. 264; Johnson v. Travis, 33 Minn. 231, 22 N. W. 624. Such facts must be pleaded. Smith v. Braun, 37 La. Ann. 225.

[33] Burnett v. Simpkins, 24 Ill. 264; Johnson v. Travis, 33 Minn. 231, 22 N. W. 624; Denslow v. Van Horn, 16 Iowa, 476; Kelley v. Highfield, 15 Or. 277, 14 Pac. 744; Irving v. Greenwood, 1 Car. & P. 350; Beach v. Merrick, 1 Car. & K. 463.

[34] Denslow v. Van Horn, 16 Iowa, 476.

reason that its breach does not result in the same injury as if the character had been good.[35]

EXEMPLARY DAMAGES.

163. Exemplary damages are awarded on the same principles as in tort actions.

Actions for breach of promise of marriage are, as to damages, classed with actions for torts; and the motives of defendant may be inquired into with a view to furnishing ground for punitive damages.[36] Precisely the same rules govern the allowance of exemplary damages as would be applied if the action were in tort.[37] Evidence of the circumstances under which the promise was broken is admissible in aggravation or mitigation of damages. "It is always competent, for the purpose of enhancing the damages, to prove the motive that actuated the defendant; that he entered into the contract, and broke it, with bad motives and a wicked heart; and it is competent for him to prove, in mitigation of damages, that his

[35] Burnett v. Simpkins, 24 Ill. 264; Kantzler v. Grant, 2 Ill. App. 236. See, also, Butler v. Eschleman, 18 Ill. 44; Doubet v. Kirkman, 15 Ill. App. 622; Denslow v. Van Horn, 16 Iowa, 476; Palmer v. Andrews, 7 Wend. 142; Von Storch v. Griffin, 77 Pa. St. 504; Budd v. Crea, 6 N. J. Law, 370; Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925. "Any misconduct showing that the party complaining would be an unfit companion in married life may be given in evidence in mitigation." Suth. Dam. § 990, citing Leeds v. Cook, 4 Esp. 256; Button v. McCauley, 5 Abb. Prac. (N. S.) 29; Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95. Declarations of plaintiff that she cared nothing for defendant, and only wanted his money, and to spite his family, are admissible in mitigation of damages. Miller v. Rosier, 31 Mich. 475. But see Miller v. Hayes, 34 Iowa, 496. See, also, Robinson v. Craver, 88 Iowa, 381, 55 N. W. 492. Where defendant had seduced plaintiff under promise, it has been held that he cannot prove her general bad character between the promise and the breach. Boynton v. Kellogg, 3 Mass. 189; Espy v. Jones, 37 Ala. 379.

[36] Thorn v. Knapp, 42 N. Y. 474.

[37] See ante, p. 200; Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308. The allowance of exemplary damages is discretionary with the jury, and it is reversible error to instruct them that, if they find that defendant purposely wronged plaintiff and that his conduct was malicious, they are bound to give exemplary damages. Jacobs v. Sire, 4 Misc. Rep. 398, 23 N. Y. Supp. 1053.

motives were not bad, and that his conduct was neither cruel nor malicious. In the case of Johnson v. Jenkins,[38] it was held competent, in mitigation of damages, for the defendant to prove, when asked by the plaintiff why he had discontinued his visits to her, that he declared that his affection and regard for her were undiminished, but that he could not marry her, because his parents were so violently opposed to the match. Judge Allen, writing the opinion of the court, says: "Every circumstance attending the breaking off of the engagement becomes part of the res gestæ. The reasons which were operative and influential with the defendant are material, so far as they can be ascertained; and whether they are such as, tending to show a willingness to trifle with the contract and with the rights of the plaintiff, should enhance the damages, or, on the contrary, showing a motive consistent with any just appreciation of and regard for his duties, should confine the damages within the limit of a just compensation, will always be for the jury to determine." [39]

[38] 24 N. Y. 252.

[39] Thorn v. Knapp, 42 N. Y. 474. See, generally, Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308; Coil v. Wallace, 24 N. J. Law, 291; Coryell v. Colbaugh, 1 N. J. Law, 77; Johnson v. Travis, 33 Minn. 231, 22 N. W. 624; Kelley v. Highfield, 15 Or. 277, 14 Pac. 744; Goddard v. Westcott, 82 Mich. 180, 46 N. W. 242; Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925; Moore v. Hopkins, 83 Cal. 270, 23 Pac. 318. Evidence of matters in aggravation of damages which occur after the suit is brought is incompetent. On this principle a letter, addressed by defendant to plaintiff, accusing her of unchasteness and containing many gross and indecent expressions, was excluded. Greenleaf v. McColley, 14 N. H. 303. Charges of immorality in an affidavit during progress of trial are inadmissible. Leavitt v. Cutler, 37 Wis. 46.

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